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## How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control

Gerald P. Lopez

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# How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control

GERALD P. LÓPEZ\*

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## Introduction

Since the late 1990s, principally fueled by the staggeringly high and ever-growing price of mass incarceration, mainstream institutions and individuals have focused on the need for more ambitious and effective reentry programs.<sup>1</sup> Led by the Council of State Governments, and particularly by the codification of policy statements and recommendations promulgated and spread by the Reentry Policy Council,<sup>2</sup> these mainstream reformers have managed, in my estimation, both to champion their own ambitious approach to reentry and likely doom its chances of success.

This effect might well be characterized as predictable and even intentional. After all, a bipartisan collection of elected and appointed officials and the mainstream institutions and actors they collaborate with both want to announce suitably impressive programmatic proposals and to make certain little upsets the status quo they have created, sustained, and continue to benefit from. They have too much at stake in “what is” (jobs, status, power, and more) to overturn the various systems that together provide them material and ideological sustenance. This sort of interest analysis may be enough to expose and explain the dynamics at work. And an estimable line of thinkers (from investigative journalists to Marxist historians to Lower East Side bodega coffee drinkers) have helped us all to look for these dynamics.

Yet the approach to reentry pursued by the Reentry Policy Council and all with whom they collaborate, particularly as embodied in the 632 page REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY,<sup>3</sup> reveals a perhaps deeper contradiction: The Reentry Policy Council offers a genuinely utopian vision of reentry (not at all my vision but utopian nonetheless) and overwhelmingly reasserts the biases that favor the current approach they aim to overturn.<sup>4</sup> That contradiction may well be representative of the work of mainstream reformers and perhaps of mainstream reforms within liberal democracies. Yet precisely because of the familiarity of this strange internal negation, we perhaps forget to “notice” the built-in tendency. Worse still,

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1. For illustrations of the mainstream literature documenting and contributing to fiscally-driven attention to reentry, see e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY XXI (2005).

2. See Council of State Governments website, CSG JUSTICE CENTER, <http://csgjusticecenter.org/> (last visited Oct. 15, 2013).

3. RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY (2005) [Hereinafter, REPORT OR REPORT OF THE RE-ENTRY POLICY COUNCIL].

4. In modern legal scholarship, the origins of this insight and methodology can be traced to Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

we may accept as promising a program that, at most, offers “status quo +” reforms and seduces us into believing we’re effectively addressing (“solving”) the targeted problem.

But matters are more twisted than that. Even if the Reentry Policy Council’s grandest ambitions for reentry were realized, mainstream reformers would still barely reduce the size and the make-up of mass incarceration in the United States. And they would almost not at all challenge the convictions that drive the criminal justice system and other related systems (foster care and immigration, for example) that connect directly to how we profile, label, and deal with criminal offenders. The Reentry Policy Council report propagates a particular preoccupation with reentry that distracts us from directly facing the question of how to reduce mass incarceration and fundamentally alter the criminal justice system.<sup>5</sup>

Ambitious reentry programs always have been the right and the wise thing to do. That is true, whether you regard yourself as hugely in favor of the “get tough on crime” (and its “War on Drugs”) or hugely opposed. Among most militant opponents, and emphatically in my own view, reentry has always been the right and wise thing to do but absolutely never has been or will be a substitute for dramatically and immediately reducing mass incarceration and fundamentally altering the assumptions and aspirations of our criminal justice system. Even if you have come to accept that, “this is just what mainstream reformers do,” even if you believe “that’s the way the world works,” acquiescence in the reproduction of the current state of affairs is its own indecent contribution to brutality. We can do away with mass incarceration and transform the criminal justice system. Even if we cannot, we ought to behave as if we can and contribute sweat equity to trying.

## I. Basic Histories and Descriptions

### A. Operation Targeted Mass Incarceration and Social Control

Beginning in the 1970s, the criminal justice system (federal and states) transformed its laws, its institutions, its policies, and its practices in ways that caused the rate of imprisonment to multiply in unprecedented terms over

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5. Opponents of the “get tough on crime” have insisted that the bi-partisan mainstream’s relatively new fascination with ambitious cost-reduction reentry should not distract from ending mass incarceration and transforming the criminal justice system—much as others have argued, more recently, that debates about wrongful convictions and the death penalty should not obscure the scope and nature of mass incarceration and need for massive overhaul of sentencing. See Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL’Y REV. ONLINE 1, 8 (2008) <http://web.archive.org/web/20120625051547/>, [http://www.hlpronline.com/Berman\\_HLPR\\_120808.pdf](http://www.hlpronline.com/Berman_HLPR_120808.pdf).

the next four decades.<sup>6</sup> Between the late 19th century and 1975, the rate of imprisonment averaged 100-150 for every 100,000 members of the total population and, by 2006 (perhaps the summit year), that rate had jumped to 750 individuals per 100,000.<sup>7</sup> Today, the United States has the highest rate of imprisonment of any nation in the world (greater than Russia and South Africa, considerably greater than Europe).<sup>8</sup>

Were we to count all those incarcerated through the immigration system (1,518,104 people),<sup>9</sup> and were we to count all those locked up in local jails (748,728 people),<sup>10</sup> the number incarcerated would increase. And were we then to count all those on parole and on probation (7,076,200 people),<sup>11</sup> the number under the direct management of the criminal justice

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6. This description draws on a massive body of literature and, for only a small sample of valuable sources, see e.g., SABRINA JONES & MARC MAUER, *RACE TO INCARCERATE: A GRAPHIC RETELLING* (2013); ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARY BOSWORTH, *EXPLAINING U.S. IMPRISONMENT* (2009); MICHELLE BROWN, *THE CULTURE OF PUNISHMENT: PRISON, SOCIETY, AND SPECTACLE* (2009); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); Conference, *PUNISHMENT: THE U.S. RECORD*, 74 *SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY*, no. 2(2007); BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* (2008); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* (2008); THE PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009); ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* (2010); TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* (2008); MARC MAUER, *RACE TO INCARCERATE* (2006).

7. For just some of the sources offering these and related data, see GOTTSCHALK, *supra* note 6, at 1-6; *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 279-92 (Marc Mauer & Meda Chesney Lind eds., 2002); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3-17 (2003).

8. See ERNEST DRUCKER, *supra* note 6, at 43. (As of 2008, the "U.S. rate of incarceration is the highest in the world—756 per 100,000—a rate more than seven times that of European Union countries and greater than that of Russia or South Africa."). For the most recent Bureau of Justice and International Statistics, see LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATION IN THE UNITED STATES* 2011 3, 6 (2011), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4537> (last visited Oct. 23, 2013) and INTERNATIONAL CENTRE FOR PRISON STUDIES, *ENTIRE WORLD - PRISON POPULATION RATES PER 100,000 OF THE NATIONAL POPULATION*, available at [http://www.prisonstudies.org/info/worldbrief/wpb\\_country.php?country=190](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190) (last visited Oct. 23, 2013).

9. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *MAY 2011 AVERAGE DAILY POPULATION BY DETENTION FACILITY*, <http://www.ice.gov/doclib/foia/dfs/average-daily-pop-by-facility-may2011.pdf> (last visited Oct. 9, 2013).

10. TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *JAIL INMATES AT MIDYEAR 2011--STATISTICAL TABLES*, NCJ 237961 (2012) available at <http://www.cdcr.ca.gov/realignment/docs/BJS-Jail-Report.pdf>.

11. PROQUEST, LLC, PROQUEST STATISTICAL ABSTRACT OF THE UNITED STATES: 2013, at 229 tbl. 355 (2013).

system would expand even more still. However, even these dramatically enhanced numbers misjudge the control exercised by the state through its criminal justice system. Every day law enforcement officers pursue varied formal and informal “stop and frisk” programs, surveillance techniques that far more often than not serve principally to let people know they’re being watched and, at any time, might be rousted.<sup>12</sup>

This system of enhanced mass incarceration and social control especially targets low income, of color, and immigrant communities. So disproportionate has been the impact on the Black population and (especially in some areas) the Latino population that labels like “tough-on-crime” and “War on Drugs” have now among some given way to “the New Jim Crow.”<sup>13</sup> How better to capture the continuation of a racial caste system? But it’s not only and it’s not simply about men. Women of color (especially Black women) have been incarcerated at an alarming rate that, until fairly recently, had largely gone overlooked in scholarly and popular literatures.<sup>14</sup> And juveniles (yes, Black, yes, Latinos, but more than most would think Asian Pacific Islanders, Natives, and poor Whites) have been entangled in the criminal justice system in ways that, only through a deranged vision of justice, can possibly make sense.<sup>15</sup> And within all the groups, the Lesbian, Gay, Bisexual, and Transgender population does what it can to survive.<sup>16</sup>

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12. For a deeply thoughtful and utterly disquieting depiction of the Mayor Bloomberg-endorsed racially-targeted “stop and frisk” practices of the New York City Police Department, read Judge Shira Scheindlin’s 198-page opinion and her 39-page order in *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) holding New York City’s “stop and frisk” practices unconstitutional. Available at <http://www.nytimes.com/interactive/2013/08/12/nyregion/stop-and-frisk-decision.html>.

13. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). For a small sample of the recent literature that has offered similar analysis, see e.g., RUTH WILSON GILMORE, *THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001).

14. For contrasting examples of accounts, see INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* (2006); GREG BARAK, PAUL LEIGHTON AND JEANNE FLAVIN, *CLASS, RACE, GENDER, AND CRIME: THE SOCIAL REALITIES OF JUSTICE IN AMERICA* (2010); RACE, GENDER, AND PUNISHMENT: FROM COLONIALISM TO THE WAR ON TERROR (MARY BOSWORTH & JEANNE FLAVIN EDS. 2007).

15. For a sample of a still far-too-small but hopefully growing literature, see e.g., Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584 (2012); VICTOR RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011); BEHIND BARS: LATINO/AS AND PRISON IN THE UNITED STATES (SUZANNE OBOLER ED. 2009); Angela E. Oh & Karen Umemoto, *Asian Americans and Pacific Islanders: From Incarceration to Re-Entry*, 31 AMERASIA JOURNAL 43 (2005); STEVEN W. PERRY, *DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME* (2004); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

16. For difficult questions and penetrating insights about the incarcerated LGBT community,

Perhaps the most blithely unnoticed impact of targeted mass incarceration and social control has been the terrible damage imposed upon families and kinship networks and neighborhoods and communities. Unnoticed perhaps by most professionals, scholars, and by everyone in the United States who does not have “their own” arrested and convicted and incarcerated for the crimes they almost certainly now and then commit.<sup>17</sup> But those who have lived with having a loved one locked up know the trauma. Those who live with large numbers of their neighbors locked up and on parole and on probation—and with cops “protecting” them through endless “stops and frisks”—experience the damage that criminologists only in recent years have begun in any depth to try to understand.<sup>18</sup>

Do not for a moment believe that targeted mass incarceration and social control did not face zealous opposition. This approach to criminal justice rapidly became and still is an immensely powerful system, but it is not an all-encompassing regime successfully indoctrinating everyone. Many people within low income, of color, and immigrant communities stood their ground. They knew the familiar feeling of being both neglected by most systems (public education, health) and targeted by criminal justice and child welfare and foster care.<sup>19</sup> Often together with the incarcerated (to whom they were so closely tied), they were having none of this “safety only through incarceration” brainwashing.<sup>20</sup> Standing shoulder to shoulder with

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see e.g., Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011).

17. Of course, exceptions become all the more notable. See e.g., DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004). An earlier literature aiming to understand relationship between family ties and post-prison success can be traced to Lloyd Ohlin’s pioneering efforts to develop a parole success prediction scale. See e.g. Lloyd E. Ohlin, *The Routinization of Correctional Change*, 45 J. CRIM. L. CRIMINOLOGY 7 Police Sci. 400 (1954-55).

18. TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

19. For the extraordinary work of Regina Austin and Dorothy Roberts, see e.g., Regina Austin, *“Step on a Crack, Break Your Mother’s Back”: Poor Moms, Myths of Authority, Drug-Related Evictions from Public Housing*, 14 YALE J. L. & FEMINISM 273 (2002); Regina Austin, *“Not Just for the Fun of It!” Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7–10, 74–92 (2002); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012). For the insights of the next generation of gifted practitioners and scholars, see e.g., Alina Ball, *An Imperative Redefinition of “Community”: Incorporating Reentry Lawyers to Increase the Efficacy of Community Economic Development Initiatives*, 55 UCLA L. REV. 1883 (2008). For an example of my own decades-long emphasis on how low-income, of-color, and immigrant communities have been both neglected and targeted by diverse systems and institutions, see e.g., Gerald López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009).

20. For an enthralling examination of these relationships (as they exist and as they might)



the incarcerated, and those living with criminal convictions and their communities were some criminal defense and civil rights lawyers, some epidemiologists, some journalists, some educators, some prison librarians and chaplains, some nuns running community organizations, and (the usually closeted) allies on the bench, within prosecutorial ranks, and in parole and probation departments. Yes, I know cops on the beat who always have regarded mass incarceration as madness but knew better than to voice their views too openly.

This militant opposition fought in at least two overlapping ways. They challenged every assumption and aspiration of the mass incarceration and social control operations of the criminal justice systems. In courthouses, on the streets, and in print they tried with all their might to offer full-bodied resistance. In particular, those locked up deployed a range of informal and formal strategies to express their fundamental objections to the fact and the duration and the conditions of imprisonment.<sup>21</sup> The incarcerated continued to breathe life into the famous observation that “[w]hen the prisoners began to speak, they possessed an individual theory of prisons, the penal system, and justice. It is this form of discourse which ultimately matters, a discourse against power, the counter-discourse of prisoners and those we call delinquents . . .”<sup>22</sup>

At the same time, this militant opposition aimed to develop a counter-vision of a criminal justice system they would be willing to defend. No, they did not want simply to turn back the clock to the early 1970s, though the years before the Rockefeller Drug, Three Strikes, and mandatory sentencing laws obviously hold their allure. Instead they aimed at a practicable utopia, starting wherever they could, through shifting and enduring collaborations, quietly working as if they lived within or might well create some counterfactual realms.<sup>23</sup> Openly personal and perhaps quixotic, this militant opposition has proven resilient, if understandably disappointed in failing yet to meet their aspirations.<sup>24</sup>

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within the Black community, see Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769 (1992).

21. For an important exploration of how those incarcerated themselves led many of these challenges, and the concerted campaign to close off legal challenges by inmates, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). For a sample of literature describing the rise of the modern “prisoners’ movement,” see e.g., RONALD BERKMAN, *OPENING THE GATES: THE RISE OF THE PRISONERS’ MOVEMENT* (1979); James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts*, 1960-80, 2 CRIME AND JUSTICE 429 (1980).

22. MICHEL FOUCAULT, *Intellectuals and Power*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 205, 209 (Donald F. Bouchard & Sherry Simon trans., Donald F. Bouchard ed., 1977).

23. For an illustration of a former prosecutor who writes ambitiously to offer one counter-vision of criminal justice that reflects multiracial and multicultural hip-hop culture, see PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009).

24. For an interview with one militant and resilient member of this opposition, see Katti

But opponents faced a juggernaut. Operation targeted mass incarceration and social control almost immediately took hold of the body politic. Even in the late 20th century, being “tough on crime” had been a conservative rallying cry since at least the 1970s. And in the 1950s and 1960s, prominent Democrats like Governor Edmund G. (Pat) Brown (1959-1967), a former District Attorney and State Attorney General, believed “[y]ou help people by locking them up, by putting them in institutions,” and “emphasized very strongly the more institutions the better.”<sup>25</sup> But especially upon hearing, Ronald Reagan declaration a “War on Drugs,” loyalists from both parties marketed “safety through incarceration” with remarkable ingenuity and success.<sup>26</sup>

Ideological, financial, and career interests quickly became entangled with—and dependent upon—the growth of targeted mass incarceration and social control. Lobbyists, and legislative and executive and administrative officials they deal with, made prison budgets virtually untouchable. Prison guards became among the most powerful unions in the country. And the growingly privatized penal system proved at least as rabid as prosecutors and correctional experts and parole and probation departments in pressing for ever more prisons and jails.

Operation targeted mass incarceration and social control has now reigned for nearly forty years. From President Reagan through (especially) President Clinton to President Obama, across parties and states, this approach to criminal justice long ago became “the law.” And, for so many, the law ordains the truth and deeply embeds itself into daily life.<sup>27</sup> Certainly, for all those who create or carry out these by now nearly mindless routines, this approach has become “natural;” it is their default mode. Without much or perhaps any conscious thought, people just “doing their jobs” robotically reproduce the fantasy of incarceration zealots.<sup>28</sup> Between the power of the status quo and the concerted campaigns of invested interests, mass incarceration and targeted social control appeared able to reproduce itself far into the future.

In the past several years, though, evidence leads some to declare the

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Gray, *The Run-On Sentence: Eddie Ellis on Life After Prison*, THE SUN (July 2013), [http://thesunmagazine.org/issues/451/the\\_run\\_on\\_sentence?page=1](http://thesunmagazine.org/issues/451/the_run_on_sentence?page=1).

25. See Jan Marinissen, “To Let the Legislature Know”: *Prison Advocacy and the American Friends Service Committee in California, 1960–1983* at 8 1985. Government History Documentation Project, Ronald Reagan Gubernatorial Era. Berkeley, CA: Regional Oral History Office.

26. See Alexander, *supra* note 13, at 27.

27. For an illustration of the literature that explores the power of law to ordain truth, see Jack M. Balkin, *The Proliferation of Legal Truth* 26 HARV. J. L. & PUB. POL’Y 5 (2003).

28. For an article among the leading work on routinized behavior, see John A. Bargh & Erin L. Williams, *The Automaticity of Social Life*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 1 (2006).

criminal justice system no longer impossible to change. Indeed a small but influential band of conservatives (“Right on Crime”) claims they should and will be as tough on criminal justice spending as they are on crime.<sup>29</sup> In a speech before the American Bar Association, Eric Holder announced the Obama Administration would scrutinize federal regulation of sentencing for racial disparities and with reentry in mind.<sup>30</sup> Various states have reduced their prison population in response to legislative mandates and court orders (perhaps most conspicuously, California finds itself doing both).<sup>31</sup>

Anyone seeing these events as the demise of targeted mass incarceration and social control is dreadfully over-reading the evidence. It’s not just that Right on Crime, Eric Holder, and Governor Brown all pledge their undying allegiance to being “tough-on-crime.” It’s that in New York City, in 2013, the staunchly independent and too-wealthy-to-be-bought-off Mayor, Michael Bloomberg, defiantly defends the NYPD “stop and frisk” practices as not only fully constitutional, but precisely what targeted (overwhelmingly Black and Latino) neighborhoods need for their own protection. He means, at once, to insist that he is doing social justice and that “stop and frisk” is an utterly natural and rational constraint deployed to maximize the freedom of law-abiding residents.<sup>32</sup>

With bravado both familiar and all-too-revealing, Bloomberg is boldly and simultaneously speaking to the dominators and the dominated in claiming the high (the highest) ground and denying any contradiction in this approach to criminal justice. Whether he is unable to see or unable or unwilling to acknowledge the inherent clash within his statements and his philosophy may be impossible to discern. For our purposes, it may not much matter. Operation targeted mass incarceration and social control still

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29. For the Right on Crime’s founding principles, see <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Oct. 23, 2013).

30. For the full text of Holder’s speech, see Attorney General Eric Holder, Remarks at the American Bar Association’s House of Delegates (Aug. 12, 2013) (available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>).

31. For the most recent turn in California’s saga, see Patrick McGreevy and Anthony York, *Analysts See hope for California prison overcrowding solution*, L.A. TIMES, Sept. 25, 2013, <http://articles.latimes.com/2013/sep/25/local/la-me-ff-prisons-20130925>. For one of the first efforts to document efforts to reduce the current prison population, see Shelley Johnson Listwan, Cheryl Lero Jonson, Francis T. Cullen, & Edward J. Latessa, *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL’Y 423 (2008).

32. Mayor Bloomberg’s position, and that of the City of New York’s Police Department, can be readily discerned by reading Judge Scheindlin’s opinion and order (*See Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) at <http://www.nytimes.com/interactive/2013/08/12/nyregion/stop-and-frisk-decision.html>) or the extensive media coverage of the Mayor’s blasts against “some woman” who knows “zero” about police work. See e.g., Mara Gay, Greg B. Smith & Daniel Beekman, *Bloomberg blasts stop-and-frisk judge as ‘some woman’ who knows ‘zero’ about cops*, N.Y. Daily News, Aug. 16, 2013, <http://www.nydailynews.com/new-york/bloomberg-blasts-stop-and-frisk-judge-zero-article-1.1429166>.

reigns—in reality and as ideology.

## B. Council of State Governments' Reentry Policy Council

As the colossal costs of mass incarceration became more transparent in the 1990s, questions about reentry policies and practices once raised only by the militant opposition suddenly caught the attention of elected and appointed officials, mainstream consultants, correctional officials, and their staffers. Especially within this constellation of individuals and institutions, the Council on State Governments positioned itself to coordinate and lead the effort to examine and recommend how to transform reentry programs into an ambitious cost-reduction tool without sacrificing (and perhaps while even enhancing) the safety presumably provided by targeted mass incarceration and social control.

Founded in 1933, the Council of State Governments ("CSG") describes itself as the "only organization serving all three branches of state government."<sup>33</sup> Encompassing every elected and appointed state and territorial official in the United States (executive, legislative, judicial branches and their administrative staff), CSG cultivates "the exchange of insights and ideas to help state officials shape public policy."<sup>34</sup> It does so through regional offices as well as extensive and amply funded regional, national and international networks, where officials and consultants and staffers routinely meet, regularly share information, and cultivate problem-solving partnerships. Created by the states and for the states, CSG proudly declares itself a member-driven association that reflects state priorities.<sup>35</sup>

In 2001, with an acute appreciation of both the fiscal squeeze imposed by "tough on crime" policies and the promise of reentry as a cost-reduction and face-saving strategy, CSG created the Reentry Policy Council. Two specific goals shaped the new venture: (1) to develop bipartisan principles for elected, appointed officials, and all with whom they work to help frame and address reentry issues in their jurisdictions, and (2) to facilitate the sharing of information and coordination among systems, institutions, and organizations implementing reentry initiatives and the funding to develop and sustain such work.

After several years of meetings and discussion, CSG's Reentry Policy Council published the RE-ENTRY POLICY REPORT: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY. Aiming to provide a "comprehensive vision" of successful reentry reform, and totaling 632 pages of detailed guidance, the report encompasses a "bipartisan"

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33. *About the Council of State Governments*, CSG JUSTICE CENTER, <http://csgjusticecenter.org/about-csg/> (last visited Oct. 15, 2013).

34. *Id.*

35. See statement of CEO David Adkins, *About CSG Executive Director/CEO*, CSG JUSTICE CENTER, <http://www.csg.org/about/executivedirector.aspx> (last visited Oct. 15, 2013).

consensus of institutions and individuals from across the country, all aiming to make people's transition from prison or jail to the community to be safe and successful.<sup>36</sup>

The Report indeed reflected the collaboration of "nearly 100 leading elected officials, policy makers, and practitioners," working in "nearly every component of the criminal justice system."<sup>37</sup> The collaboration included members from a variety of fields and serving varied roles, including judges, religious leaders, legal aid attorneys, correctional facility administrators, academics, and law enforcement officers.<sup>38</sup> Numerous state elected officials joined these efforts as did representatives from federal agencies, including the FBI, Fannie Mae, and the Department of Justice. Additionally, the Reentry Policy Council worked in partnership with 10 cooperating organizations, such as the Urban Institute, the American Association of Parole and Probation Officers, and Association of State Correctional Administrators.

Even before publication, the Report received glowingly generous praise. Among the early endorsers was Fox Butterfield, a well-regarded journalist dedicated to broadening the national debate surrounding incarceration and recidivism rates. In a 2004 New York Times article, Butterfield highlighted the need for better services for reentering inmates and a smoother transition period between prisons and the community.<sup>39</sup>

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36. *About CSG Executive Director/CE, supra* note 35. Even more accurately, the Report is 632 pages long and contains 24 pages of prefatory materials (a table of contents, lists of partners, and an executive summary) and had been outlined in advance by the Report Preview, 22 helpful pages sketching what the Report itself would provide and accomplish.

37. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 2.

38. Those involved in the process of researching, developing, writing, vetting, editing, and distributing the report, included State Legislators (co-chaired the initiative): Eric Bogue, Senate Majority Whip in South Dakota; John Lored, Minority Leader in the Arizona House of Representatives; Jeffrion Aubry, Chair of Corrections Committee in New York State Assembly; Facilitators of Advisory Group Meetings: David Fariman, Beth Greenland, Tom Quinn; Steering Committee (principal writers): Michael Thompson, Elizabeth Nevins, Katherine Brown, Matthew Schwarzfeld (Council of State Governments); Carl Wicklund (American Probation and Parole Association); John Blackmore (Association of State Correctional Administrators); Richard Cho (Corporation for Supportive Housing); Christine Siksa (National Association of Housing and Redevelopment Officials); Laura Skufca (National Association of State Alcohol/Drug Abuse Directors); William T. Emmet (National Association of State Mental Health Program Directors); Scott Cheney (National Association of Workforce Boards); Kay Farley (National Center for State Courts); Corina Solé Brito (Police Executive Research Forum); Amy Solomon (Urban Institute); Expert Advice & Text Contributors: Jim Austin, Tony Fabelo, Adam Gelb, Dr. Robert Greifinger, Gail Hughes, Dr. Lambert King, Arlene Lee, David Lewis, Stefan Lobuglio, Debbie Mukamal, Mario Paparozzi. Hugh Potter, Roberta Richman, Ed Rhine, Anne Seymour, Carol Shapiro and her staff at Family Justice, Faye Taxman, Jeremy Travis, Vicki Turetsky, Ashbel T. Wall; Funding Support: Department of Justice, Department of Labor, Department of Health & Human Services, Robert Wood Johnson Foundation, JEHT Foundation, Open Society Institute. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3.

39. Fox Butterfield, *Repaving the Long Road Out of Prison*, N.Y. TIMES, May 4, 2004,

Propelled by the recession and the cost of incarceration, prison administrators and policy makers (including President Bush), had regenerated interest within bipartisan mainstream circles. One very promising new effort Butterfield lauded was the Council of State Government's Reentry Policy Council.<sup>40</sup> Having convened the nation's best experts, the Reentry Policy Council was developing a thorough and detailed guide that would contain "recommendations on how states can better help newly released prisoners find jobs, get decent places to live, and re-establish relationships."<sup>41</sup>

Widely disseminated through the CSG's extensive networks, the Report immediately received accolades among bipartisan mainstream reformers interested in cost-reduction and safety-enhancing reentry. So prominent did the Report almost instantly become, that it served, in part, as support for the passage of the Second Chance Act. The Act, a first-of-its-kind federal legislation designed to provide greater services to prisoners returning to their communities, awarded federal grants to government agencies and nonprofit organizations implementing strategies designed to reduce recidivism by improving outcomes for people returning from prisons, jails, and juvenile facilities.<sup>42</sup> Dollars from the Second Chance Act (coupled with others leveraged from federal, state, local, private, and philanthropic sources) permitted CSG to launch The Justice Center, a national non-profit that serves all states by promoting cost-reducing data-driven criminal justice (particularly reentry) practices.<sup>43</sup>

Today, the Justice Council oversees the National Reentry Resource Center, the Reentry Policy Council, and the Justice Reinvestment Initiative. Working in formal partnership with the Urban Institute, the American

<http://www.nytimes.com/2004/05/04/us/repaving-the-long-road-out-of-prison.html?pagewanted=all&src=pm>, (last visited Sept. 13, 2013). For another example of Butterfield's work during these years, see e.g., Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES, Aug. 28, 2002, at A14 (commenting upon empirical findings that include that more Black men are incarcerated than in colleges or universities).

40. *Id.*

41. *Id.*

42. Editorial, *Shrinking the Prison Population*, N.Y. TIMES, May 10, 2009, <http://www.nytimes.com/2009/05/11/opinion/11mon2.html> (last visited Sept. 10, 2013). Signed into law on April 9, 2008, the Second Chance Act (P.L. 110-199) grant programs are funded and administered by the Office of Justice Programs in the U.S. Department of Justice. Within the Office of Justice Programs, the Bureau of Justice Assistance awards Second Chance Act grants serving adults, and the Office of Juvenile Justice and Delinquency Prevention awards grants serving youth returning from the juvenile correction facilities.

43. *About the Justice Center*, CSG JUSTICE CENTER, <http://csgjusticecenter.org/about-jc/> (last accessed Oct. 18, 2013). The Justice Center traces its origins to the CSG's Eastern Regions Conference Justice Program, which CSG developed in response to an "unprecedented surge in the region's prison population and a corresponding increase in state spending on the construction and operation of prisons." *Criminal Justice*, EASTERN REGIONAL CONFERENCE, [http://www.csgeast.org/policy/criminal\\_justice.aspx](http://www.csgeast.org/policy/criminal_justice.aspx) (last visited Sept. 11, 2013).

Association of Correctional Administrators and the American Probation and Parole Association (all served earlier as cooperating agencies on the Reentry Policy Council), financially supported by diverse funds, the Justice Council aims to build the most extensive library of reentry resources, to further evidence-based research in the field of reentry, and to facilitate the exchange of information. In order to achieve these goals, the National Reentry Resource Center provides training and technical assistance to a wide-variety of state governments, nonprofits, service providers, and correctional institutions. Ultimately, the Center hopes to become a library for “what works” for reentry policy.<sup>44</sup> Currently, the Resource Center is gathering information to create an online “dashboard” to track the progress of statewide reentry programs and its website already displays an interactive map that identifies the reentry programs in each state.<sup>45</sup>

Meanwhile, the Reentry Policy Council and its RE-ENTRY POLICY REPORT continue to gather lavish praise. Mainstream reformers in Texas and Kansas credit the work of the Reentry Policy Council and the Justice Center as instrumental to their policy changes over the past decade.<sup>46</sup> The Office of Justice Assistance, a branch of the Department of Justice, offers the Report of the Reentry Policy Council as *the* guide for reentry policy makers everywhere.<sup>47</sup> Scholars glowingly describe the Reentry Report as a “landmark document.”<sup>48</sup> Congress seeks out the Reentry Policy Council to

44. *What Works in Reentry Clearinghouse*, CSG JUSTICE CENTER, <http://whatworks.csjusticecenter.org/> (last visited October 18, 2013).

45. *National Criminal Justice Initiative Map*, CSG JUSTICE CENTER, <http://csjusticecenter.org/reentry/national-criminal-justice-initiatives-map/> (last visited Oct. 18, 2013).

46. *Shrinking the Prison Population*, *supra* note 41.

47. Reentry Initiative, BUREAU OF JUSTICE ASSISTANCE, available at [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=75](https://www.bja.gov/ProgramDetails.aspx?Program_ID=75) (last accessed May 8, 2012); Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. LAW BULL. Art 3 (“The result was a national Reentry Policy Council that issues a highly influential report in 2005, and has been instrumental in developing effective policy and programs surrounding reentry.”).

48. Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility and Prospects*, 47(2) CRIM. L. BULL. 177 (2011); For a sample of the many articles and books favorably referring to the Reentry Policy Council’s Report, even before its publication, see Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 127 (2011); Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL. 416 (2009); Mark A. R. Kleiman & Kelsey R. Hollander, *Mass Incarceration: Causes, Consequences, and Exist Strategies: Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89 (2011); Martha Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, 73-JUN FED. PROBATION 16 (2009); Eugenia Schraa, *Delegational Delusions: Why Judges Should Be Able to Delegate Reasonable Authority Over Stated Supervised Release Conditions*, 38 FORDHAM URB L.J. 899 (2011); Hon. Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. FOR SOC. JUST. 31 (2011); Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421 (2011); Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191 (2010); William J. Rich, *The Path of Mentally Ill*

provide briefings on the successes of cost- and recidivism-reduction programs and the need for continued federal funding.<sup>49</sup> And the *New York Times* cites the Reentry Policy Council as proving that reentry can in fact succeed in lowering recidivism rates.<sup>50</sup>

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*Offenders*, 36 FORDHAM URB. L.J. 89 (2009); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008); Doug Jones, *A Cruel and Unusual System: The Inherent Problems of the Practice of Outsourcing Health Care of Prisons and Jails*, 27 CHICANA/O-LATINA/O L. REV. 179 (2008); Christy A. Visser, *Returning Home: Emerging Findings and Policy Lessons About Prisoner Reentry*, 20 FED. SENT'G REP. 93 (2007); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007) (cited in note 124); Catherine Megan Bradley, *Old Remedies Are New Again: Deliberate Indifference and the Receivership in Plata v. Schwarzenegger*, 62 N.Y.U. ANN. SURV. AM. L. 703 (2007) (cited in note 218); Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007); Andrew Brunsden, *Hepatitis C in Prisons: Evolving Toward Decency Through Adequate Medical Care and Public Health Reform*, 54 UCLA L. REV. 465 (2006); Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J.L. & TECH. 159 (2006); Lorenn Walker, Ted Sakai, & Kat Brady, *Restorative Circles – A Reentry Planning Process for Hawaii Inmates*, 70-JUN FED. PROBATION 33 (2006); Kamala Harris, *Holding Offenders Accountable: Why Reentry Matters*, 40-JUN PROSECUTOR 32 (2006); Ralph Kirkland Gable & Robert S. Gable, *Electronic Monitoring: Positive Intervention Strategies*, 69-JUN FED. PROBATION 21 (2005) (listed in cited references); John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447 (2005); ANDREW CUOMO, URBAN AGENDA: THE NEW NEW YORK AGENDA (2011) (see page 266); USING SOCIAL SCIENCE TO REDUCE VIOLENT OFFENDING (Joel A. Dvoskin, Jennifer L. Skeem, & Raymond W. Novaco eds., 2011); LIOR GIDEON & HUNG-EN SUNG, RETHINKING CORRECTIONS: REHABILITATION, REENTRY, AND REINTEGRATION (2010); D. RICHARD LAWS & TONY WARD, DESISTANCE FROM SEX OFFENDING: ALTERNATIVES TO THROWING AWAY THE KEYS (2010); JOEL T. ANDRADE, HANDBOOK OF VIOLENCE RISK ASSESSMENT AND TREATMENT: NEW APPROACHES FOR MENTAL HEALTH PROFESSIONALS (2009); RALPH J. DICLEMENTE, JOHN S. SANTELLI, & RICHARD A. CROSBY, ADOLESCENT HEALTH: UNDERSTANDING AND PREVENTING RISK BEHAVIORS (2009); GARY F. CORNELIUS, THE ART OF THE CON: AVOIDING OFFENDER MANIPULATION (2008); ANNE CAROLYN GRUNSEIT, SUZIE FORELL, & EMILY MCCARRON, TAKING JUSTICE INTO CUSTODY: THE LEGAL NEEDS OF PRISONERS (2008); KLAUS SERR, THINKING ABOUT POVERTY (2008); CAROLINA VILLAGRA PINCHEIRA, HACIA UNA POLÍTICA POSTPENITENCIARIA EN CHILE (2008); AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES (2007); PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES, Robert B. Greifinger, Joseph A. Bick, & Joe Goldenson eds., (2007); BRENDA J. BOND, ORGANIZATIONAL MANAGEMENT OF OFFENDER REENTRY: THE MULTIDIMENSIONAL CHALLENGES OF CHANGE (2006); WHO TO RELEASE?: PAROLE, FAIRNESS AND CRIMINAL JUSTICE, Nicola Padfield ed. (2005); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005); JEREMY TRAVIS, AMY L. SOLOMON, & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (2001).

49. For a report of a recent briefing, see *Second Chance Act*, BUREAU OF JUSTICE ASSISTANCE, (APRIL 24, 2013), [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=90](https://www.bja.gov/ProgramDetails.aspx?Program_ID=90)(last visited Oct. 18, 2013).

50. *Shrinking the Prison Population*, *supra* note 42.



## II. Summary of the Reentry Policy Council Report

Almost anyone who reads the full 632 pages of the Reentry Policy Council Report will be impressed. The Report feels remarkably comprehensive, powerfully characterized, and logically entailed. The stories and arguments make a convincing case that the extraordinary budget crises require policymakers to make certain that people do not return to prisons and jails after release. To provide precisely that guidance, the Report offers big analytical categories that make sense on their own terms and connect lucidly to other large categories. Each category entails sensible sub-categories, and categories and subcategories together yield policy statements.

Each policy statement is a prescriptive principle, both conceptually impressive and suitably researched. Individually, each policy statement targets the problem it addresses, complete with recommendations that provide the steps to be taken to implement the particular policy. By providing means to target a goal, each policy statement equips policy makers with a place to begin rather than feeling paralyzed by the enormity of reentry.<sup>51</sup> “Agents of change” (the term the Report uses to include everyone at local, state, and federal levels involved with reentry) can actually use the Report to understand and do what they must to dramatically improve reentry process and results.<sup>52</sup>

At the same time, the policy statements collectively entail a comprehensive vision for the safe and successful transition of a person from prison or jail to the community. That vision reveals the interrelationship between all policy statements and recommendations. The Report does not endorse a one-size-fits-all approach: Each community must ground the vision in the particulars of its own problems and resources. But after two years of work by an “unprecedented, bipartisan collection of nearly 100 leading elected officials, policymakers, and practitioners,” the Reentry Policy Council fearlessly guarantees its Report as entailing “policy statements and recommendations that, if implemented, will ensure the safe and successful return of individuals from prison or jail to the community.”<sup>53</sup>

That robust confidence reflects the scientific methods that shape, measure, and (as necessary) serve to improve every policy statement and recommendation the Report provides the nation’s state and local policymakers. Programs and strategies must reflect, the Reentry Policy Council resolutely asserts, an “evidence-based” approach: interventions and treatments that have been proven effective “through a rigorous scientific

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51. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 8.

52. *Id.* at 2.

53. *Id.*

process.”<sup>54</sup> With the precision provided by science, the Report radiates a jubilantly conquering attitude: If every step is followed to the letter, the nation can finally solve the reentry challenge, providing us both cost-effective and safety-enhancing answers that have escaped earlier well-intentioned but less-than-fully exacting and thorough efforts.

For the skeptical and even the cynical, the Reentry Policy Council evinces a reassuring savvy in the course of the 632 pages. On every front, the Report appears to identify likely obstacles and complications. And, in advance, the Reentry Policy Council provides suggestions for how to deal with—even perhaps preempt—these impediments and difficulties. To further ease the mind of doubters, the Report reveals a brand of technocratic pragmatism—one befitting the best scientific policymakers—in announcing the need always to learn and amend as evidence reveals ways to advance on advances. If critics are not silenced, they ought to appreciate just how formidable a constellation of experts drew up this Report and continue to work for and with the Reentry Policy Council.

Perhaps it’s no accident that the Report makes frequent mention of the importance of faith-based communities and religious role models for recently released inmates. In a grand sense, the Reentry Policy Council provides the same sense of comforting uplift often associated with organized religion, communicating to worried souls that they are, at last, in safe hands. In bad and even terrible economic times, the Report offers people *hope*—hope with roots in science rather than in the unsupported recipes of earlier eras or the heated contentions of opponents of mass incarceration. Like charismatic leaders of a powerful movement of experts, the Reentry Policy Council captivates its audiences with the promise of answers, expecting slowly but surely to convert nonbelievers to its side.

Make no mistake. The Reentry Council Report is, I think, significant on several related grounds. The Report reflects the acknowledgment among bipartisan elected and appointed officials that the costs of mass incarceration are so monumental and so impossible to conceal any longer that they must offer a compelling, comprehensive, and detailed codification of how we can and should change reentry precisely in order to reduce costs and still provide the safety many link to the last thirty-plus years of “tough on crime” policies. In a fashion characteristically true of policymakers in United States, that codification aspires to change the very status quo that it principally reinforces through its formulations of and prescriptions for addressing the problems. Perhaps like all such codifications, the Reentry Policy Council’s Report can be understood as, at once, alluringly convincing from certain perspectives and transparently unpersuasive from still others.

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54. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 624.

What I hope you at least will consider is that what looks like a game plan for transforming reentry serves far more effectively as a reaffirmation of the ideological presuppositions supporting the current criminal justice system. That choice by the Reentry Council obscures what we actually face and what credibly we must do even to begin to fundamentally alter reentry and the various systems implicated in its implementation and insures that things shall remain pretty much as they are now. I will focus my attention on how the Report can and should be interpreted as reinforcing—yet again—institutional arrangements and political principles that doom its proclaimed ambitions.

But my efforts to reveal the conscious and unconscious and unstated and half-buried and off-handed biases upon which the Report has been so stylishly designed should not be understood as a refusal on my part to recognize certain discernible utopian ambitions. At least some involved with the production, dissemination, and implementation of the Reentry Policy Council's detailed recommendations might well regard (and I believe at least a small number do regard) the Report as ushering in a role for reentry utterly denied over the past thirty or more years. These idealists accept as uncontestable certain practical constraints and political convictions that (beyond being patently unacceptable for me) enfeeble their own utopian aspirations.

### **The Report**

In order to create something like the effect of reading the entire Report, I shall aim with great fidelity to provide a summary of the Reentry Policy Council's work. It's far-fetched, I realize, but I aim for a degree of verisimilitude. As a result, that summary will itself be long and meticulous. What follows will be my own effort to expose certain central biases driving the Report. That will be, by design, pointed and evocative. That allocation of space is highly conscious. Unless you have some feel for the Report's ambitiousness, you cannot possibly understand why it has been so influential and so little challenged. Either what I have to say in exposing particular predispositions will give you pause about the Report's actual transformative power or I will have failed.

### **A Brief Overview**

The Report aspires to serve as a broad-based policy guide to help "policymakers and practitioners" (elected and appointed officials and practitioners working in criminal justice, health, housing, workforce development)—and others interested—plan out a reentry initiative. Tucked into each policy sections are several different recommendations to help administrators and policy makers implement the goals and principles of the program. Along with these recommendations are small blurbs included

from reentry programs. The blurbs detail examples of collaborative reentry initiatives from around the country. Each of these small blurbs corresponds to a program that is indexed by state in the back of the Report.

The Reentry Policy Council divided their policy statements into three separate sections. The first section of the Report aims to guide policymakers and practitioners through the process of creating a coalition among agencies, an infrastructure for collaboration between these organizations, and a common understanding of the reentry needs in their community. Next, the Report follows the path of a typical inmate through the reentry process, framing the journey through two dozen suggestions for policy goals or changes to the reentry system. Beginning with admitting procedures and ending with responses to parole and probation violations, the bulk of the Report provides practical proposals for improving the variety and quality of care that inmates receive in prison and outside, with the express goal of a reduction in recidivism. Then the Report focuses on systematic changes to housing systems, employment agencies, health care providers, and social services providers. The Report bunches these systematic improvements under the title of “reentry” because these services provide the foundation for the post-release transition period for many returning inmates. Finally, the Report includes a substantial national index of different projects and organizations that have attempted to create effective reentry programs.

Several claims tie the Report together and shape the policy statements and recommendations for each of the topics addressed. Reentry reform will be best achieved, the Report asserts, through reentry initiatives that bring an extensive coalition of actors together to reshape the nature of incarceration and help transition inmates back into the community.<sup>55</sup> Programs should provide evidence-based services and those services must be frequently evaluated. Providing more effective treatment for inmates suffering from mental illness, physical impairments, and drug addiction will substantially alter the landscape of reentry. Broader collaboration between agencies will provide more effective treatment and more complete supervision of inmates.

### **Framing The Problem**

At the end of 2003, the population of prisons and jails in the United States eclipsed 2,200,000.<sup>56</sup> Approximately 97% of those incarcerated in prisons and virtually every person locked up in jail will eventually be released.<sup>57</sup> In 2004, nearly 650,000 people were released from prisons and

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55. REPORT OF THE RE-ENTRY POLICY COUNCIL, *supra* note 3, at xxiv.

56. *Id.* at xxviii.

57. *Id.* at xix.

over 7 million different individuals from jails. And those numbers are growing.<sup>58</sup> But reentry—the transition from prisons and jails back to the community—has largely failed. Roughly two out of every three people released from prison in the US are rearrested within three years of their release, and over half return to prison for a new offense or a violation of their terms of release.<sup>59</sup>

With the possible exception of health care, spending on corrections has increased faster than any other item in state budgets. Nationally, corrections expenditures have gone from \$9 billion in 1982 to \$60 billion in 2002. Many states already cannot afford these costs and, for the first time, bi-partisan leaders agree that there is not enough money in state budgets to pay for the current upward trends triggered by the “tough on crime measures” that brought significant community safety over the past quarter century. In order to reduce the costs of incarceration without endangering (and possibly even enhancing) public safety, reentry must be approached comprehensively and scientifically. Through evidence-based policies and recommendations, and through the ability of a wide range of experts to work with one another, across systems, institutions, and public, private, and civil boundaries, policymakers will ensure that people do not return to prison or jail after release.

### **Part I: Planning a Reentry Initiative**

The Reentry Policy Council identifies two key elements for building a foundation for reentry reform: convening the right people and analyzing the right data.<sup>60</sup> According to the Report, this process already has been initiated across the country. Because every state and U.S. territory has received a grant under the Serious and Violent Offender Reentry Initiative, the Reentry Policy Council concludes that, across the nation, somebody has convened some committee of stakeholders to analyze reentry problems.<sup>61</sup> Beyond this federalized approach, the Report speculates that many state and local governments may have convened separate working groups and task forces to study the problem.<sup>62</sup> Capitalizing on these overlapping efforts, the Report aims to guide already engaged stakeholders towards effective collaborations as well as funding and evaluation of data-driven initiatives.

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58. REPORT OF THE RE-ENTRY POLICY COUNCIL, *supra* note 3, at 3.

59. *Id.*

60. *Id.* at 17.

61. *Id.*

62. *Id.*

*A. Convening the Right People and Getting Them to Work Together*

The single “most important common denominator shared among jurisdictions that have launched a successful reentry initiative,” declares the Report, “is that some collaboration between representatives of at least two independent organizations preceded the development and implementation of the program or policy.”<sup>63</sup> To begin forging such connections, the Reentry Policy Council recommends recognition of the complexities of the different systems and familiarity with the culture, funding, philosophy, structure and oversight of each system.<sup>64</sup> After learning about different overlapping systems, policymakers and practitioners should identify key stakeholders and engage them in discussions regarding reentry.<sup>65</sup> The Reentry Policy Council urges opening a dialogue among leaders in the system.<sup>66</sup> More specifically, the Report proposes identifying individuals whose authority spans more than one organization or agency and who can help foster collaboration across boundaries.<sup>67</sup>

To signal the importance of expansive collaboration, the Reentry Policy Council focuses an entire policy statement on incorporating reentry into the mission and work plans of targeted organizations. This process can be as difficult as it is essential.<sup>68</sup> According to the Report, policymakers and practitioners will find it to be a struggle to overcome reluctance within many actors being asked to work collaboratively on reentry and prison reform.<sup>69</sup> Limited budgets and scarce resources often force reentry concerns to the bottom of many priority lists.<sup>70</sup> To make matters worse, institutions often work in isolation and rarely interact with others.<sup>71</sup>

Overcoming this reluctance, policymakers and practitioners must target and convince quality community-based organizations to work with correctional staff inside facilities and in their neighborhoods.<sup>72</sup> In order to determine the quality, they must assess an organization’s demonstrated ability to collect data, to comply with performance indicators contractually imposed, and to provide an effective service delivery system adhering to existing evidence-based practice.<sup>73</sup> To avoid predictable biases, they must ensure that procurement rules do not inadvertently favor larger

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63. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 18.

64. *Id.* at 19.

65. *Id.* at 20.

66. *Id.* at 21.

67. *Id.* at 22.

68. *Id.* at 47.

69. *Id.* at 38.

70. *Id.*

71. *Id.*

72. *Id.* at 44–45.

73. *Id.* at 46.

organizations (with established rapport with facilities) over smaller organizations (especially those not already connected to funders).<sup>74</sup>

Develop relationships with leaders in the community, urges the Reentry Policy Council, to help gather information about local institutions and to help link correctional facilities to communities.<sup>75</sup> In order to connect those released to geographically convenient services,<sup>76</sup> policymakers and practitioners must determine whether and how effectively organizations are providing "neighborhood-based services,"<sup>77</sup> and they should facilitate community-based organizations' access to prisons and jails, of course without compromising security concerns.<sup>78</sup>

Policymakers and practitioners must work to change the cultures of criminal justice, health providers, and human services organizations to make them more amenable to collaboration. Leaders of these entities must begin to recognize, insists the Reentry Policy Council, that their mission includes the safe and successful return of prisoners to the communities from which they came.<sup>79</sup> To help shift the orientation of these institutions and encourage greater collaboration, policymakers and practitioners must appreciate how each organization's mission relates to reentry and how returning prisoners can be included in the service population.<sup>80</sup> To do so, review the quality of services provided by organizations to determine whether the services need to be more accurately targeted and whether the performance measures should be revised to fairly evaluate efforts to work effectively with particularly challenging groups of people.<sup>81</sup>

That may be easier said than done, says the Reentry Policy Council. To make these determinations requires well-informed professionals, and two-thirds of states, require no professional qualifications for parole board members.<sup>82</sup> To remedy this knowledge gap, states adopt professional qualifications for parole board members, develop trainings for judicial officers who set conditions of release during sentencing,<sup>83</sup> and appoint only qualified professionals to make these release decisions.<sup>84</sup>

Exhortations and inducements should be part of what policymakers and practitioners offer leaders of quality organizations, especially those evincing reluctance. Highlight that the organizations may already be

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74. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 48.

75. *Id.*

76. *Id.* at 42.

77. *Id.* at 43-44.

78. *Id.*

79. *Id.* at 38.

80. *Id.* at 39-40.

81. *Id.*

82. *Id.* at 52 (citing PETERSILIA, *supra* note 1).

83. *Id.*

84. *Id.* at 51-52.

serving people with criminal records and that reward (both intangible and tangible) may follow from explicitly coordinating with correctional officials and programs.<sup>85</sup> Correctional officials, says the Report, can guarantee to organizations a high level of participation by reentering inmates, especially through the use of incentives and sanctions governing the correctional system's probationers and parolees.<sup>86</sup> And they can highly recommend ways technology may be cost effective in connecting community-based service providers to incarcerated patients and clients.<sup>87</sup> To help recruit community organizations to target reentry population, policymakers and practitioners can require that all contracts with private service providers who work inside correctional facilities include provisions for services to be provided after the inmate leaves the correctional facility.<sup>88</sup>

To ensure seamless transitions during post release, sufficient supervision of transitioning inmates, and effective service delivery,<sup>89</sup> the Report demands that systems work together, which will require individuals to learn about the organization of and operation within other systems, develop over-arching approaches to governance and common benchmarks for achievement.<sup>90</sup> One element of this demand focuses on short-term goals and effectively managing the reentry initiative. Another longer term aspiration aims to train providers to work together to provide services seamlessly to inmates during transitions between incarceration and the community. To facilitate this brand of coordination, the Reentry Policy Council recommends creating and maintaining forums for project oversight, information sharing, and communication across agencies and organizations.<sup>91</sup> High-ranking officials should create a type of super structure with an oversight team that establishes within a jurisdiction ultimate authority over all collaborative reentry efforts.<sup>92</sup> This team requires a coordinator, who organizes meetings, monitors the implementation of programs,<sup>93</sup> and effectively communicates with the chief executive of the jurisdiction.<sup>94</sup>

The oversight committee should represent a variety of stakeholders

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85. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 49-50, (citing LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Probation and Parole in the United States*, 2002, US Department of Justice, NCJ 201135 (Washington, DC: 2003), available at <http://www.policyalmanac.org/crime/archive/probation&parole2002.pdf>.

86. *Id.* at 49-50

87. *Id.* at 51.

88. *Id.* at 50.

89. *Id.* at 74.

90. *Id.*

91. *Id.* at 75.

92. *Id.*

93. *Id.* at 76.

94. *Id.*



(including community leaders)<sup>95</sup> and facilitate routine communication to keep all subcommittees updated.<sup>96</sup> The Report does not stop there, however. The Reentry Policy Council encourages intersystem training that can foster greater cooperation and linked information systems.<sup>97</sup> It further recommends a staff member to serve as a “boundary spanner,” helping inmates navigate across multiple agencies and follows the individual during and following their incarceration.<sup>98</sup> To formalize commitments to these arrangements, partnering agencies should sign memoranda of understandings (MOU), identifying the allocation of shared resources, the accountability measures for each agency, and the expectations of the combined efforts.<sup>99</sup> Finally, the Reentry Policy Council recommends establishing goals and benchmarks common to all parties and agencies.<sup>100</sup>

### *B. Gathering Information*

The Report recommends that stakeholders and organizers understand the nature and the scope of the local reentry issues and develop familiarity with local release policies, the characteristics of returning prisoners, and the resources and the capacity of the community.<sup>101</sup> The Reentry Policy Council cautions against relying solely on national data and encourages communities to make financial investments in research on their local reentry issues.<sup>102</sup> The Reentry Policy Council thus provides a “roadmap” to build a state- and local-level knowledge,<sup>103</sup> recommending that communities understand “who” is being released from prison.<sup>104</sup> Policymakers and practitioners will want to learn about the nature and needs of their population.<sup>105</sup> Important factors include demographic information, percentage of population with gang affiliations, types of criminal histories, types of health concerns, level of employability, housing needs, and substance abuse problems.<sup>106</sup> Often the department of corrections will already collect this data,<sup>107</sup> making access relatively easy.<sup>108</sup>

This knowledge should include a compilation of federal, state, and

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95. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 77.

96. *Id.*

97. *Id.* at 78.

98. *Id.* at 84.

99. *Id.* at 85.

100. *Id.* at 86.

101. *Id.* at 23.

102. *Id.* at 23–24.

103. *Id.* at 25.

104. *Id.* at 26.

105. *Id.*

106. *Id.* at 26–27.

107. *Id.* at 27.

108. *Id.*

local policies influence and govern reentry.<sup>109</sup> To gather such information, the Report steers policymakers to three types of sources: Sentencing statutes, statutes governing the decision-making process for release and post-release supervision, and regulations governing the objective and conditions of probation or post-release supervision. In urging policymakers and practitioners to grasp the importance of geography, the Reentry Policy Council insists researchers can discover the neighborhoods that have high concentrations of returning inmates, whether services exist in those areas, and any other co-occurring problems in those communities that need to be addressed.<sup>110</sup>

Never taking its eye off recidivism,<sup>111</sup> the Reentry Policy Council suggests that learning the characteristics of those most likely to reoffend can help target resources to the neediest populations.<sup>112</sup> Policymakers and practitioners should examine how prisoners prepare for reentry while incarcerated as well as how community corrections officers supervise and aide individual in the transition from prison back into the community.<sup>113</sup> Focus on the percentage of prisoners in work release programs and the percentage of prisoners making use of services in the community.<sup>114</sup> Collect information on the steps that prepare prisoners and their families for release, when prisoners travel home if their places of incarceration are located far from their communities, and how prisoners are prepared for employment after their release.<sup>115</sup>

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109. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 28.

110. *Id.* at 33. For more information relating to this kind of specific locational information, the report offers several guides and examples such as the Reentry Mapping Network, the Perry School Community Services Center Asset Mapping Project, the National Institute of Justice Mapping and Analysis for Public Safety Program, the Northwest Regional Educational Laboratory, and Community Mapping, Planning & Analysis for Safety Strategies (COMPASS) (pp. 30).

The report also states that this kind of information “has been effectively used to target services for and surveillance of parolees; to inform interventions to fight gang-related gun violence; and to improve the delivery of service for victims” (30, citing to Keith Harries, *Applications of Geographical Analysis in Probation and Parole*, 4 JOURNAL OF THE AMERICAN PROBATION AND PAROLE ASSOCIATION, 26–31 (2002); ANTHONY BRAGA ET AL., NATIONAL INSTITUTE OF JUSTICE, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT’S OPERATION CEASEFIRE (2001); and DEBRA A. STOE ET AL., NATIONAL INSTITUTE OF JUSTICE USING GEOGRAPHIC INFORMATION SYSTEM TO MAP CRIME VICTIM SERVICES (2003)).

111. *Id.*

112. *Id.*

113. *Id.* at 35.

114. *Id.*

115. *Id.*

### C. Funding

The Reentry Policy Council directly addresses funding reentry initiatives, services, and programming. According to the Report, the single biggest obstacle to developing and implementing reentry programs is lack of money.<sup>116</sup> As result, the Reentry Policy Council provides suggestions for effectively using the current funds, increasing the level of funds spent on reentry, and reducing the need for funds through better controlling rates of incarceration.

The Report focuses on making the most of current spending levels, thereby recommending using limited funds only on evidence-based programs that have been proven effective.<sup>117</sup> Concentrate dollars on individuals just prior to or just after their release, for money can be most effective during these periods of greatest need.<sup>118</sup> Utilize volunteers from community and faith-based groups to supplement staffing and to increase program capacity.<sup>119</sup> Volunteers can serve as good role models for healthy behavior and can help bridge the divide between correctional facilities and the outside community.<sup>120</sup> But because volunteers cannot be substitutes for professionals, they can require costly trainings and oversight,<sup>121</sup> and can clash with corrections officers because of differing perspectives,<sup>122</sup> the Report recommends assigning an agency representative to coordinate volunteers and act as a liaison between correctional staff and volunteers.<sup>123</sup>

The Reentry Policy Council recommends that institutions determine how funding sources intended for the same populations can be coordinated and leveraged effectively to serve reentry purposes.<sup>124</sup> This approach would avoid attempting to raise new targeted reentry funds, which the Report views as difficult. Instead, correctional facilities and service providers should take advantage of funding that already exists by combining funds to support reentry initiatives.<sup>125</sup> The Report provides an eight-page guide to nontraditional funding sources that could be used towards reentry services, such as Public Housing Choice Vouchers and Community Development

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116. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 53.

117. *Id.*

118. *Id.* at 55.

119. *Id.* at 68-9. Here, the report fails to cite to any literature or data. Instead it gives two examples: Women's Mentorship Program, Rhode Island Department of Corrections; Shadow/Mentorship Program, Islamic Health and Human Services (MI).

120. *Id.* at 69.

121. *Id.* at 70.

122. *Id.*

123. *Id.*

124. *Id.* at 56.

125. *Id.* at 57.

Block Grants monies.<sup>126</sup>

Beyond managing money more resourcefully, the Reentry Policy Council suggests managing the growth of the prison population better.<sup>127</sup> The Report states that “changes to policies that govern prison admission and length of stay can in fact quickly create a major stream of revenue.”<sup>128</sup> These policy changes usually mean a combination of more flexible release dates, modifications to existing sentencing regulations, and graduated sanctions for violators of parole and probation.<sup>129</sup> The important feature of these sorts of changes will be ensuring that savings will be reinvested in the reentry system, instead of filling budget gaps or building new highways.<sup>130</sup> Policy makers should work to guarantee that prison savings are spent on reentry initiatives.

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126. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 58–65.

127. *Id.* at 67.

128. *Id.* The report offers an illustration of such measures taken in Connecticut. Due to legislation passed in May 2004 by the General Assembly, “of the \$60 million allocated for the anticipated contract to send inmates out of state, the majority of these funds [were] returned to the general fund . . . \$16 million were redirected to fund additional probation and parole officers, halfway houses, and the New Haven Community Foundation, charged with establishing a pilot project to assist a handful of neighborhoods expanding their capacity to receive people released from jail.” *Id.* at 68. The report also cites to Michigan as an example of a state legislatures changing sentencing laws. On December 25, 2002, former Governor John Engler signed into law a piece of legislature repealing some mandatory sentencing laws for certain drug offenses. (*Id.* at 72–3) In advocating for administrative changes in prison admissions, the report cites to a study by Michael Jacobson that states that “28% of all prison admissions are either probation or parole violators and at least half of these violations are technical—offenses for which someone could not be sentenced to prison.” (*Id.* at 72–3)

129. *Id.* at 67–73.

130. *Id.* at 67–8.

### *D. Evaluation*<sup>131</sup>

A pivotal assumption and aspiration for the Reentry Policy Council's the presumed value of using tested methods—"evidence-based" and "cost-benefit analysis" to use the rhetoric the Report comfortably embraces and unabashedly champions. This theme influences many of the recommendations throughout the Report, including the Reentry Policy Council emphasis on creating procedures to measure and evaluate program outcomes during implementation.<sup>132</sup> These evaluations should answer three key questions: Is the program producing the desired results? Is the program generating the greatest possible impact? Is the program the most efficient use of public funds?<sup>133</sup> The Reentry Policy Council recommends rigorous evaluations of the program's process, which examine the underlying theory and implementation behind the program. Programs should be subjected to separate evaluation of outcomes to determine whether the program has achieved the intended effect,<sup>134</sup> and program outcomes should, when possible, be measured against an experimental or random sample to properly compare the data.<sup>135</sup>

The Report demands analysis of both the broad overarching foundation of the program and the individual components. The Reentry Policy Council

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131. The report provides the nonprofit East County One-Stop as an example of a success-measuring program. It simply states that the organization "formed a committee to identify criteria to measure success in serving high-barrier populations." *Id.* at 86. The report also offers two examples of agencies that could help "define, measure, and report on the success of a reentry-initiative." *Id.* at 88. It refers to the Little Hoover Commission in California and Washington State Institute for Public Policy. The report cites to Mary Ann Scheirer, *Designing and Using Process Evaluation in HANDBOOK OF PRACTICAL PROGRAM EVALUATION* (Joseph S. Wholey, Harry P. Hatry, & Kathryn E. Newcomer eds., 1994) in its defense of the use of process evaluations in examining "program design and implementation." *Id.* at 92.

In terms of undertaking a cost-benefit analysis with respect to any reentry initiative, the report cites to ADELLE V. HARRELL & BARBARA SMITH, *THE URBAN INSTITUTE EVALUATION OF THE DISTRICT OF COLUMBIA SUPERIOR COURT DRUG INTERVENTION PROGRAM* (1996), stating that linking the analysis to the impact evaluation "leads to the estimate cost of each successful client." *Id.* at 93. The report also gives an example of an correction agency's in-house research and evaluation unit, the Georgia Board of Pardons and Paroles. *Id.* at 94. In discussing the effectiveness of substance abuse treatment programs, the Report cites to the Correctional Program Assessment Inventory (CPAI), which can "help corrections administrators determine whether a given program has an evidence base." *Id.* at 182.

For an example of the adoption of "evidence-based programs" see WASH. STATE INST. FOR PUB. POLICY, *OUTCOME EVALUATION OF WASHINGTON STATE'S RESEARCH-BASED PROGRAMS FOR JUVENILE OFFENDERS*, (Jan. 2004), where the Washington State Legislature passed the Community Juvenile Accountability Act (CJAA) to establish "research-based" programs in the state's juvenile courts.

132. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 87.

133. *Id.*

134. *Id.* at 87, 92.

135. *Id.* at 92.

recommends developing a sound “logic model” to build a shared understanding of the programs objectives, strategy, activities, and the relationship between the program’s components and partners.<sup>136</sup> A logic model visually represents the framework of a program by describing the components of the program, the sequence of activities, and the relationships between each of these activities and their impact on the community.<sup>137</sup> In an effort to further scrutinize the program’s progress, the Reentry Policy Council recommends administrators develop measures to continuously monitor staff performance and to determine whether goals are being met.<sup>138</sup>

After both process and impact evaluation, the Report recommends requiring a cost-benefit analysis to quantify whether a program is operating efficiently.<sup>139</sup> Do a program’s benefits outweigh its costs? Especially in fiscally difficult times, cost-benefit studies must ensure efficient allocation and expenditure of funds. Because such studies are expensive and typically beyond the means of many local community-based organizations and agencies, the Report emphasizes the need to develop relationships with cost-benefit analysts employed by correctional institutions and colleges and universities.<sup>140</sup>

#### *E. Educating the Public About Reentry*

In an attempt to gain public support for reentry programs, the Reentry Policy Council urges policy makers, practitioners, and advocates to prioritize public education efforts. These education initiatives should inform the public of the needs of the reentering inmates and the risks of ignoring this population. Education should highlight the benefits of the successful initiatives to public safety and the community.<sup>141</sup> The Report notes that policy makers must be able to represent that this type of effective supervision has been implemented in their communities.<sup>142</sup> Building this type of credibility may be hard, and communities may have to employ substantial changes to convince the public of their ability to effectively supervise parolees.<sup>143</sup>

The Report suggests informing the public that prolonging the incarceration of every prisoner or returning every violator of probation or parole to prison or jail is neither good policy nor fiscally responsible

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136. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 89.

137. *Id.* at 90.

138. *Id.*

139. *Id.* at 93.

140. *Id.*

141. *Id.* at 95.

142. *Id.* at 97.

143. *Id.* at 98.

behavior.<sup>144</sup> In California, the shift from funding schools to funding prisons is a stark example of the fiscal consequences of mass incarceration.<sup>145</sup> The public should also be informed of the large and growing number of people with criminal records in the community.<sup>146</sup> The public should be aware that these individuals are routinely apart of everyone's daily life and must be effectively re-entered back into society.<sup>147</sup> Overall, individual stories can help put a human face on the problems facing re-entering prisoners.<sup>148</sup>

Finally, the Report recommends helping the public appreciate that preparing people in prison or jail for their release and providing support for them upon their return makes families and communities stronger, safer and healthier.<sup>149</sup> The public must understand that prisoner reentry affects everyone and the true need to reshape the reentry system.<sup>150</sup>

## **Part II: Review of the Reentry Process: From Admission to Return to the Community**

### *A. Program Planning*

This section outlines the journey of an inmate from admission into a correctional facility to reintegration back into the community. The Report describes goals for each of these stages and offers recommendations to achieve these goals. Several policy ambitions routinely surface in the policy statements. Improving the quality and quantity of treatment services to inmates, both pre- and post-release, reappears throughout the Report. Educational training and work-orientated training programs make regular appearances throughout the policy's suggestions, usually coupled with the recommendation that these services match the needs of the local job market. The Report attempts to consider community needs alongside the needs of the returning inmate throughout every facet of the reentry process,

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144. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 98. The report cites to the statements of governors Mike Huckabee (R-AR) and Bob Riley (R-AL) to demonstrate the budget pressures in their corrections systems. In addition, the report cites to Joan Petersilia's "COMMUNITY CORRECTIONS" IN CRIME: PUBLIC POLICIES FOR CRIME CONTROL (Oakland: ICS Press, 2004) to argue that slashing the already struggling jail and prison-based programs is not the solution. However, the report does not illustrate or suggest ways in which public leaders and lawmakers can or should educate the public on what is either "good policy" or "fiscally responsible behavior."

See also Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUSTICE 479 (1999).

145. *Id.* at 99.

146. *Id.* at 100.

147. *Id.*

148. *Id.* at 101.

149. *Id.* at 101-2.

150. *Id.*

ultimately making an argument for rethinking the role of community supervision.

### B. Intake

The connection between intake procedures and the reentry process is not necessarily intuitive, at least according to the Reentry Policy Council. However, the Report presses institutions to understand the relationship between intake and reentry.<sup>151</sup> The earlier staff, administrators, correctional institutions, and offenders themselves begin to think about reentry, the more thorough and comprehensive planning and programming can reshape the entire prison dynamic.<sup>152</sup> Better in-take procedures will better measure prisoner needs and connect them with suitable providers and community-based organizations.<sup>153</sup> These community organizations can provide services to inmates in the facility and after release.

According to the Reentry Policy Council, research on the current intake practices of correctional facilities shows significant room to improve admission procedures. Current screening and assessment tools are often limited in scope, only focusing a security risks and immediate health

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151. A large part of this change in focus refers to the use of assessment practices in order to use the intake process to develop more effective reentry programs. The report cites to *Prison Intake Systems: Assessing Needs and Classifying Prisoners*, (Patricia L. Hardyman, James Austin, and Johnette Peyton) to support the “efficacy of validated assessment practice.” *Id.* at 112. Additionally, the report cites to a small body of literature to suggest that the most effective treatment programs are those tailored to an offender’s individual traits, which can be measured through these assessment tools. DON ANDREWS AND JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (Cincinnati: Anderson Publishing, 2004); Francis T. Cullen and Paul Gendreau, “assessing Correctional Rehabilitation: Policy, Practice, and Prospects” in *Criminal Justice 2000*, vol 3: *Policies Processes, ad Decisions of the Criminal Justice System*, US Department of Justice, National Institute of Justice (Washington, DC: 2000). *Id.*

In explaining that appropriate intake processes should also be developed for short-term jail settings, the report offers the orientation program in the Hampden County Jail and House of Correction (Mass.) as an example (*Id.* at 118). During this five-week orientation program, inmates undergo screening processes, attend daily classes and then, based on their screenings, participate in intensive programming.

The article *A Reentry-Centered Vision of Criminal Justice*, argues for a reentry-focused criminal justice system, not just making reentry part of the intake process. By requiring actors at the forefront of the criminal justice system to consider reentry goals, the article argues that individuals will be better able to reenter into their communities later. Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FEDERAL SENTENCING REPORTER, pp 103–109 (2007). Faye S. Taxman, *The Cattle Call of Reentry: Not All Processes Are Equal*, 10 CRIMINOLOGY & PUBLIC POLICY 925 (2011) also provides an interesting article on the need of a culture change and the creation of an environment where individuals coming into the justice system can change from the outset.

152. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 109.

153. *Id.*



needs.<sup>154</sup> Yet, even this focus on risk assessment does not yield effective information gathering. Often, correctional departments use security risk assessments that have not been shown to predict the behavior of the populations being assessed.<sup>155</sup>

The Reentry Policy Council's Report provides a path to better integrate the reentry needs of inmates during the initial intake process. To understand areas of improvements, corrections administrators should begin with a comprehensive review of their intake procedures.<sup>156</sup> The Report suggests utilizing both a short and easily administrable screening instrument, as well as, longer and more focused assessments of prisoner's needs.<sup>157</sup> Abbreviated instruments should help connect short-term inmates with community-based organizations that can provide them information and support after their release.<sup>158</sup>

The Report provides a lengthy list of subjects to be addressed during intake procedures, including security level, mental health, substance abuse, physical health, education and vocational history and learning style, housing, family information, social services involvement, and financial stability.<sup>159</sup> An effective intake assessment or series of assessments must effectively learn much without mindlessly aiming toward an unachievable comprehensiveness.

The Report emphasizes the connection between elements of the intake interview and the reentry process. Understanding, appreciating, and treating the mental health, physical health, and substance abuse needs of each inmate is a critical element of post-release success. The intake process should focus on identifying individuals who require further assessment for health or substance abuse problems. Inmates should receive effective employment and educational assessments to measure the type of educational or vocational training that will best prepare the inmate for future employment.<sup>160</sup> Specialists should review each inmate's history to maximize public benefit opportunities and to help manage the inmate's personal debt, including court fines and child support.<sup>161</sup>

An inmate's family relationships will be a critical element of the reentry process. Ultimately, the intake process should attempt to understand the interplay between the inmate's family life, their risks, and their needs upon reentering their community after incarceration. The policy

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154. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 111.

155. *Id.*

156. *Id.* at 113.

157. *Id.*

158. *Id.* at 118.

159. *Id.* at 114-15.

160. *Id.* at 126-28.

161. *Id.* at 128-29.

committee emphasizes the importance of accurate risk assessments for each individual prisoner to address both the inmate's initial security classification and to provide appropriate correctional programming.<sup>162</sup> Understanding the interplay between dynamic and static factors can provide better information about an inmate's security risk and help secure more effective programming.<sup>163</sup>

Beyond simply covering all of the essential materials, the Report pointedly urges administrators to demand that the screening tools and assessments provide quality information. Correctional facilities should employ only tools validated by research,<sup>164</sup> validated both by the developers of the tools and the prison administrators using them in their own facilities.<sup>165</sup> The Report emphasizes focusing on two main criteria: 1) does the instrument make sense to those who use it, and 2) does the instrument have the capacity to predict the risks and to measure needs based on statistical associations?<sup>166</sup> Tools should be tested and validated for different populations, as variations in gender and race could change the predictability and value of the tests.<sup>167</sup>

The policy lists a series of practical considerations that should be factored into the development of intake processes. For example, correctional facilities should adopt tools that can be modified for use throughout an inmate's incarceration to provide easily comparable data from different decision points.<sup>168</sup> Similarly, community-based professionals, such as service providers, law enforcement and victim's advocates, should partner with correctional facilities to reduce redundant assessments and to share critical information.<sup>169</sup> Information gathered should be disseminated to appropriate staff and service providers throughout the health and human services arena, and in order to comply with confidentiality requirements, inmates should be advised of their legal rights and given the option to sign a waiver.<sup>170</sup> Finally, the Report emphasizes the importance of proper training for officers involved in the admission process, including insuring that only trained correctional officers should administer the tests and that these officers must have a cultural competency to work with diverse communities and female inmates.<sup>171</sup>

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162. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 119.

163. *Id.*

164. *Id.* at 133.

165. *Id.* at 134.

166. *Id.* at 133.

167. *Id.* at 134.

168. *Id.*

169. *Id.* at 136-37.

170. *Id.* at 139.

171. *Id.* at 135-37.

### C. Program Plan

Program planning represents the backbone of the policy goals for the prison side of the reentry problem. A program plan should help an inmate make the "best use of his or her incarceration to improve the likelihood of success upon reentry."<sup>172</sup> To create such plans and to coordinate their implementation, an interdisciplinary team should create a step-by-step plan for each individual inmate to succeed after their release,<sup>173</sup> all of which is meant to provide structure and coordination in the midst of the current haphazard system of prison services. The counsel's analysis of current correctional facility failings connects the lack of individual planning in correctional facilities with the lack of adequate services to inmates by these facilities. According to the Report, fewer than half of state correctional facilities have a program planner on staff.<sup>174</sup> Without these planners, correctional officers often make ad-hoc decisions regarding planning for inmates, governed by availability in programs rather than applicability of the program for the inmate.<sup>175</sup> While this type of inappropriate programming will not reduce recidivism, appropriate program can be extremely beneficial for inmates and help their reentry process.<sup>176</sup>

Creating and implementing individualized plans requires coordinating efforts both within correctional facilities and the broader community. Correctional facilities should create program-planning teams based on the individual needs of each inmate and reflecting culturally and gender competent capacities.<sup>177</sup> These teams should consist of a variety of service providers (mental health care providers, community-based service providers and work force experts) and the person who has been incarcerated in order to create a step-by-step plan to prepare for release.<sup>178</sup> Teams should include and gather input from the inmate's family, victim's family, and other community members, and should consider the individual inmate's strengths, weaknesses, and background.<sup>179</sup> Ideally, the team leader who directs the implementation of the plan should have specialized background or receive specialized training to address the inmate's primary service needs

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172. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 141.

173. *Id.*

174. *Id.* at 142.

175. *Id.*

176. *Id.* The report cites to a study where inappropriate treatment actually increased recidivism rates of participants by six percent. Don A. Andrews, "The Psychology of Criminal Conduct and Effective Treatment," in JAMES MCGUIRE, *WHAT WORKS: REDUCING RE-OFFENDING* (West Sussex, England: John Wiley & Sons, 1995).

177. *Id.* at 146.

178. *Id.* at 43-44, 49.

179. *Id.* at 144.

and, later, connect the inmate to community service providers.<sup>180</sup> Correctional facilities should centralize record keeping, including developing a statewide system of sharing data and methods by which all involved regularly communicate.<sup>181</sup>

#### *D. Treatment: Physical Health Care*

Considerably improving the quality and consistency of treatment programs provided inmates is a goal repeated throughout the Report. The Reentry Policy Council first tackles the physical care services. Jails and prisons face several formidable responsibilities.<sup>182</sup> Inmates have complex health needs and are far more likely than people of comparable ages to have chronic illness, communicable diseases, and severe mental disorders.<sup>183</sup> Correctional facilities are constitutionally required to provide expensive medical care services.<sup>184</sup> Yet the incarcerated population also presents exceptional opportunities for professionals to tackle among the most difficult public health problems. Inmates suffer perhaps disproportionately from communicable diseases provide a setting where public health officials might learn more about diagnosing, treating, and preventing the spread of contagions throughout communities.<sup>185</sup>

An important way to eliminate physical health barriers to reentry is to engage community-based health care services prior to an inmate's release.<sup>186</sup> By connecting patients with outside medical care immediately after the intake process, a prison can provide medical care that would be prohibitively expensive on site, and the prison can reduce the costs of duplicative intake and diagnostic processes.<sup>187</sup> A greater link between community-based providers and prisoner increases the likelihood prisoners will continue to receive treatment after release.<sup>188</sup> Telemedicine provides

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180. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 153.

181. *Id.* at 152.

182. Citations from the report: National Commission on Correctional Health Care, *The Health Status of Soon-To-Be-Released prisoners: A Report to Congress*, vol. 1 (Chicago: National Commission on Correction Health Care, 2002); "Elderly Inmates Swell Prisons, Driving Up Health Care Costs," ASSOCIATED PRESS, Feb. 28, 2004.

Other literature: Kamala Mallik-Kane & Christy A. Visher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration*. Urban Institute, February 2008.

183. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 157.

184. *Id.* at 157-58. The report does not cite caselaw but instead the National Commission on Correctional Health Care, *The Health Status of Soon-To-Be-Released Prisoners: A Report to Congress* (vol. 1 (Chicago: National Commission on Correctional Health Care, 2002)).

185. *Id.* at 158.

186. *Id.*

187. *Id.* at 159.

188. *Id.*

an avenue to engage community based organization because, according to the Report, providers can deliver medical services without transporting inmates to medical facilities outside of the prison or jail.<sup>189</sup> Community-based organizations can provide education, disease prevention, and good health promotion to inmates, who can be particularly cooperative with medical directives.<sup>190</sup>

The Reentry Policy Council champions the principle that coordinating medical treatment reduces reentry problems. The Report recommends maintaining medical records so that all service providers have up-to-date information regarding inmates and that the records are easy to transfer once the inmate leaves.<sup>191</sup> Ideally, medical records would be available electronically so that both institutional and community members could access the information.<sup>192</sup> Co-occurring medical problems would receive more effective treatment with better coordination between service providers.<sup>193</sup> The interaction between drug abuse, mental health, and physical health is complex; treatment of one disorder will often affect the others,<sup>194</sup> and coordination between service providers could help treat conditions often worsened by treating these problems independently. The Report suggests that correctional facilities should ensure that even short-term inmates receive basic medical care and transition planning services to address their needs upon release.<sup>195</sup> Even for short-term inmates, correctional facilities should assess the individual's needs, plan for treatment, identify community programs, and coordinate the transition from incarceration to the community.<sup>196</sup>

#### *E. Treatment: Mental Health Care*

According to the Report, people with mental illnesses are significantly over-represented in prisons and jails, and co-occurring substance abuse is common among this population.<sup>197</sup> Inmates with mental illnesses are more likely to have a criminal record of violent offenses and more likely to have

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189. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 160.

190. *Id.* at 161-62. The report does not cite to any studies of the effectiveness of community-based organizations within this capacity. It does, however, provide examples of such programs such as the HIV Coordinators at the Massachusetts Department of Public Health/County Sheriffs Department and the Get Connected, Centerforce program in California which serves individuals newly admitted to San Quentin State Prison, Central California Women's Facility, and Valley State Prison.

191. *Id.* at 162.

192. *Id.* at 163.

193. *Id.* at 164.

194. *Id.* at 165.

195. *Id.*

196. *Id.* at 166.

197. *Id.* at 168.

been victims of sexual abuse and physical abuse.<sup>198</sup> Mentally ill inmates are more likely to be homeless as well.<sup>199</sup> The Report states that 60% of state prisoners with mental illnesses receive services in state prisons, and 11% of the totally population in jails nationwide receive mental health services.<sup>200</sup> However, the Report notes that only 66 % of states report helping inmates with referrals after their release, and some of those efforts amount to nothing more than handing inmates a list of possible service providers.<sup>201</sup>

To create a higher likelihood of continued care during an inmate's reentry, the Report recommends engaging community-based mental health care systems in both pre- and post-release care.<sup>202</sup> One way to engage community systems is telemedicine, which uses technology such as e-mail, telephone, and video conferencing to connect inmates with treating physicians.<sup>203</sup> This option, at least according to the Report, allows correctional facilities to offer a wider range of medical care, without the expense of travel or maintaining specialists on staff.<sup>204</sup>

Beyond providing more access to care, correctional facilities should put a wide variety of medications on formularies to provide the most effective treatment to mentally ill inmates, including some of the more expensive medications used to treat mental illness.<sup>205</sup> These facilities should also focus on providing a wide range of therapies, including training in basic skills, trauma treatment, peer or community support groups, and treatment that focus on co-occurring problems.<sup>206</sup> Specifically for co-occurring substance abuse problems, mental health providers should develop protocols, such as a comprehensive assessments and a system of coordination between service providers, to better address the individual needs of each inmate.<sup>207</sup>

#### *F. Substance Abuse*

Drug treatment programs figure prominently in the Reentry Policy Council's plan to connect better services to more inmates.<sup>208</sup> According to studies, two-thirds of jail inmates were actively involved with drugs prior to their admission, and 55% of state prison inmates admit to using drugs or

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198. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 168.

199. *Id.*

200. *Id.* at 169.

201. *Id.*

202. *Id.* at 170-71.

203. *Id.* at 171.

204. *Id.* at 171, 174.

205. *Id.* at 172.

206. *Id.* at 173-74.

207. *Id.* at 175-177.

208. *Id.* at 179.

alcohol during the commission of the crime that resulted in their incarceration.<sup>209</sup> Despite this high incidence of drug and alcohol use, the Reentry Policy Council reports that in 1997, 10% of state prison inmates reported receiving formal substance abuse treatment.<sup>210</sup> For jail inmates, only 3% of the population received these types of formal services.<sup>211</sup> For the Reentry Policy Council, this gap between inmate need and treatment presents a missed opportunity. Inmates who receive treatment in prison and during their post-release have lower recidivism rates and lower drug relapse rates than the inmates without treatment.<sup>212</sup> Furthermore, this treatment is cost effective. For every dollar spent on substance abuse treatment, three to

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209. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 180. For these statistics, the report cites to Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners*, 1997, U.S. Department of Justice, Bureau of Justice Statistics (Washington, DC: 1999), NCJ 172871; Doris James Wilson, *Drug Use, Testing, and Treatment in Jails*, Department of Justice, Bureau of Justice Statistics (Washington, DC: 2000), NCJ 179999.

Other literature:

210. *Id.*

211. *Id.*

212. *Id.* at 181. The report here cites to Gerald G. Gaes et al., "Adult Correctional Treatment," in MICHAEL TONRY AND JOAN PETERSILIA (EDS.), *PRISONS* (CHICAGO, IL: University of Chicago Press, 1999). It goes further to say that inmates who participate in treatment while and post incarceration are more likely to have better outcomes, citing to Lana D. Harrison, "The Revolving Prison Door for Drug Involved Offenders: Challenges and Opportunities," 47 *CRIME AND DELINQUENCY*, NO. 3 (2001). The report also suggests the effectiveness of therapeutic communities, citing specifically to a study that found that 25% of inmates who received treatment in prison and in the community afterwards were reincarcerated "while 64 percent of aftercare drop-outs and 42% of untreated prisoners went back to prison within three years of their release (181) (the study cited to was Kevin Knight, D. Dwayne Simpson, and Matthew Hiller, "Three-Year Reincarceration Outcomes for In-Prison Therapeutic Community Treatment in Texas," 79 *THE PRISON JOURNAL* (1999): 337-351). For the report's cited literature on therapeutic communities, see D. Dwayne Simpson, "National Treatment System Evaluation Based on the Drug Abuse Reporting Program (DARP) Follow-Up Research," in Frank M. Tims and Jacqueline P. Ludford (eds.) *Drug Abuse Treatment Evaluation Strategies, Process, and Prospects*, National Institute on Drug Abuse, Research Monograph No. 51 (Bethesda, MD: 1984); Robert L. Hubbard et al., "Treatment Outcome Prospective Study (TOPS): Client Characteristics Before, During, and After Treatment," in Frank M. Tims and Jacqueline P. Ludford (eds.), *Drug Abuse Treatment Evaluation Strategies, Process, and Prospects*, National Institute on Drug Abuse, Research Monograph No. 51 (Bethesda, MD: 1984); National Institute on Drug Abuse and National Institutes of Health, *Drug Abuse Treatment Outcome Study (DATOS)*, 1991-1995 (Bethesda, MD: 1996); Harry K. Wexler, Gregory P. Falkin, and Douglas S. Lipton, *A Model Prison Rehabilitation Program: An Evaluation of the Stay'N Out Therapeutic Community: Final Report to the National Institute of Drug Abuse* (Albany, NY: Narcotic and Drug Research, Inc., 1988). The report states that the longer the treatment lasts, the better the outcome of treatment is likely to be (citing to ROBERT L. HUBBARD ET AL., *DRUG ABUSE TREATMENT: A NATIONAL STUDY OF EFFECTIVENESS* (Chapel Hill, NC: University of North Carolina Press, 1989)). See also Stephen J. Bahr, et al., *What Works in Substance Abuse Treatment Programs for Offenders?*, 92 *THE PRISON JOURNAL* (2012) (Amongst other things, researchers reported that drug use and crime were lower among individuals whose treatment was followed by an aftercare program).

seven dollars will be saved in crime-related costs.<sup>213</sup>

The Report recommends administrators should analyze the types of need in their population, the number of inmates currently receiving treatment, and the nature and effectiveness of their treatment.<sup>214</sup> In determining the effectiveness of their programs, administrators should use established reporting methods and validated research tools to ensure their programs provide appropriate services.<sup>215</sup> Facilities should develop quality control mechanism to ensure that programs continue to provide successful treatment. Given limited resources, facilities should focus on providing the most effective programs to the neediest inmates.<sup>216</sup> Inmates with chronic substance abuse are more likely to benefit from treatment than recreational drug users or nonusing sellers.<sup>217</sup> Facilities should implement only evidence-based treatments that make the best use of available resources.<sup>218</sup>

The Reentry Policy Council makes several broad suggestions for types of treatment facilities should consider implementing. Treatment programs that anticipate reentry challenges can often help inmates remain sober after their release.<sup>219</sup> Similarly, treatment programs that stress helping a person change their behavior (including multiple levels of care)<sup>220</sup> and using the leverage of the criminal justice system provide the most effective services to individuals in the criminal justice system.<sup>221</sup> Studies have showed that therapeutic communities that create highly structured residential units where participants live for at least a year can be particularly effective for incarcerated substance abusers.<sup>222</sup> Self-help or peer-support groups are

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213. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 181. The report cites to a study that estimated that “for every \$1 spent on treatment, approximately \$7 could be gained in future savings (181) (citing Dean R. Gerstein et al., *Evaluating Drug Recovery Services: The California Drug and Alcohol Treatment Assessment (CALDATA)*, State of California, Department of Alcohol and Drug Programs (Sacramento, Calif., 1994)).

214. *Id.* at 182.

215. *Id.*

216. *Id.* at 184.

217. *Id.*

218. *Id.*

219. *Id.* at 185.

220. Considering treatment as a continuum, “multiple levels of care” simply refer to different intensities of treatment which can range from early intervention to intensive inpatient care (see pg 5 of “Quick Guide for Administrators: Substance Abuse Treatment for Persons with Co-Occurring Disorders” by U.S. Department of Health and Human Services). LOOK at Faye Taxman, “Unraveling ‘What Works’ for Offenders in Substance Abuse Treatment Services,” *National Drug Court Institute Review II*, no. 2 (1999): 91-132.

221. *Id.*

222. *Id.* at 186. In Clifford A Butzin, et al., *Treatment during transition from prison to community and subsequent illicit drug use*, 28 JOURNAL OF SUBSTANCE ABUSE TREATMENT 351 (2005), the author cites to a small body of literature that supports the positive outcomes from the use of therapeutic communities. (Hiller, M.L., Knight, K., & Simpson, D.D. (1999) Prison-based substance abuse treatment, residential aftercare and recidivism. 94 ADDICTION, 833-842; Inciardi, J. A., Martin, S. S., Butzin, C. A., Hooper, R. M., & Harrison, L. D. (1997). *An effective model of*



popular among inmates and a relatively inexpensive substance abuse treatment, but studies suggest such programs provide inconsistent results.<sup>223</sup>

*prison-based treatment for drug-involved offenders.* 27 JOURNAL OF DRUG ISSUES. 261-278; Knight, K., Simpson D. D., & Hiller, M. L. (1999). Three-year reincarceration outcomes for in-prison therapeutic community treatment in Texas. 79 PRISON JOURNAL, 337-351; Martin, S. S., Butzin, C. A., Saum, C., & Inciardi, J. A. (1999). Three-year outcomes of therapeutic community treatment for drug-involved offenders in Delaware: From prison to work release to aftercare. 79 PRISON JOURNAL, 294-320; Pelissier, B., et al. (2000). TRIAD Drug Treatment Evaluation Project final report of three-year outcomes: Part 1. Washington DC: Office of Research and Evaluation, Federal Bureau of Prisons; Wexler, H., et al. (1999). Three-year reincarceration outcomes for Amity in-prison therapeutic community and aftercare in California. 79 PRISON JOURNAL, 321-336.) However, the original article cites to the difference in outcome measures between these different studies (measuring recidivism versus actual drug use). Thus, it strives to examine the "impact of work-release treatment upon subsequent use of illicit drugs" and "the impact of treatment in the context of other variables associated with recidivism and relapse for those in correctional treatment." In looking at contextual variables, the article cites to Gendreau, P., Little, T., & Goggin, C. (1996), *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works*, 34 CRIMINOLOGY 575-607; Laub, J. H., & Sampson, R.J. (2001), *Understanding desistance from crime*. In M. Tonry ed., *Crime and justice* (pp. 1-69), Chicago: University of Chicago Press.

223. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 187." Therapeutic communities are usually residential programs with 9-to-18 month courses of treatment, followed by continuing contact during a variable period of reentry. Therapeutic-community programs are designed for people with major behavioral and social impairments, including a history of serious criminal behavior. [They] involve highly structured blends of milieu psychotherapy, behavioral modification, an internal hierarchy of jobs and progressive responsibilities, and a variety of medical, educational, and vocational services . . . [In prison, these programs] involve separation from the general prison population for 6 to 12 months, sometimes with period of community reentry in a halfway house." (846) Dean R. Gerstein, Ph.D. & Lawrence S. Lewin, *Treating Drug Problems*, N ENGL J MED 1990; 323; 844-848. According to the report, therapeutic communities within a corrections system have "increased professional staff and less client control over clinical issues" as opposed to other communities. *Id.* at 186. For examples of several therapeutic communities see the report, page 186. In contrast, self-help programs like Alcoholics Anonymous (AA) involve a more individualized process where the participants try to personally achieve recovery while regularly reporting their progress and struggles. See Bahr, et al., *What Works in Substance Abuse Treatment Programs for Offenders?* 92 THE PRISON JOURNAL 155-174 (2012).

The Report does not cite to any studies regarding therapeutic communities. It gives examples of several programs but does not articulate any success rates or other data. The Report does cite to Kevin Knight, et al., "Legal pressure, treatment readiness, and engagement in long-term residential programs," JOURNAL OF OFFENDER REHABILITATION 31, no. 1/2 (2000) in stating that residential treatment programs foster an attitude which researchers "have shown correlates with continued engagement in treatment in the community." The Report also fails to cite to studies on the effectiveness of self-help groups.

Literature on these programs: Stanley Sacks, et al., *Randomized trial of a reentry modified therapeutic community for offenders with co-occurring disorders: Crime outcomes*, 42 JOURNAL OF SUBSTANCE ABUSE TREATMENT 247 (April 2012) ("study to determine the effectiveness of a reentry modified therapeutic community for offenders with co-occurring substance use and mental disorders"); Stephen J. Bahr, et al., *What Works in Substance Abuse Treatment Programs for Offenders?*, THE PRISON JOURNAL 2012 92; Steven S. Martin, et al., *Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare*, 79 THE PRISON JOURNAL 1999, 294; Cynthia A. Robbins, et al., *Substance Abuse Treatment, Anticipated Maternal Roles, and Reentry Success of Drug-Involved*

Any program pursued by correctional officials should engage the community-based substance abuse providers. And in order to offer culturally competent services,<sup>224</sup> correctional officials should strongly aim to staff programs with former substance abusers and community members.<sup>225</sup>

### G. Children and Families

The increased rates of incarceration translate into more parents being locked up and more children growing up while their mothers and fathers are away in prisons and jails.<sup>226</sup> The Reentry Policy Council reports that only about half of correctional agencies report policies or programs that help families maintain supportive relationships.<sup>227</sup> Without such programs, families often face an uphill battle to stay in contact with incarcerated relatives. Prisons are often hundreds of miles away from an inmate's last residence, collect calls are expensive, and security protocols limit the interaction during visitations, which can often be uncomfortable and humiliating for parents.<sup>228</sup> To deal with these challenges, the Policy Counsel recommends providing greater services to family members and, when appropriate, helping to reestablish and strengthen family relationships.<sup>229</sup> Research suggests that incarcerated parents can influence their children in positive ways.<sup>230</sup> Not coincidentally, programs that strengthen family relationships can reduce recidivism rates, increase the likelihood of a successful reentry, and lower rates of physical and emotional problems for incarcerated inmates.<sup>231</sup>

The Reentry Policy Council outlines practical ways for correctional facilities to help inmates develop closer relationships with their families.<sup>232</sup> For example, correctional facilities should gather detailed information about

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*Women Prisoners*, 55 CRIME & DELINQUENCY 2009: 388; Wayne N. Welsh, *A Multisite Evaluation of Prison-Based Therapeutic Community Drug Treatment*, 34 CRIM JUSTICE AND BEHAVIOR 1481, 2007; Clifford A. Butzin, Treatment during transition from prison to community and subsequent illicit drug use, 28 JOURNAL OF SUBSTANCE ABUSE TREATMENT 351 (2005).

224. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 188.

225. *Id.*

226. *Id.* at 191.

227. *Id.*

228. *Id.* at 192.

229. *Id.* at 190.

230. *Id.* at 192.

231. *Id.*

232. For an example of literatures developed at about the time the Report was being finalized. See e.g., Christy A. Visser & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANNU. REV. SOCIOL., 89–113, (2003) (the article acknowledges the importance of understanding family in order to understand reintegration of former prisoners).

an individual's family needs and strengths during the intake process.<sup>233</sup> Using this information, prisons and jails should provide services that address individual family needs. The Reentry Policy Council acknowledges that some families will be uncertain about fostering a relationship with the incarcerated relative.<sup>234</sup> Correctional facilities should make referrals available to hesitant families and those services should remain available to families throughout the incarceration and reentry period.<sup>235</sup>

Beyond providing supportive services, the Reentry Policy Council highlights ways that correctional institutions can strengthen the bond between inmates and their families through continuous contact. The Report focuses on this bond as a way to ease the reentry process because families can be an important resource for incarcerated individuals, both during incarceration and afterwards.<sup>236</sup> Increasing the connection between inmates and their families can help provide an individualized safety net and support system. Prisons and jails can improve the quality of visitations by providing family orientated visiting areas that allow parents to play and interact with their children.<sup>237</sup> States can decrease the financial burden of these trips by providing visitor assistance programs that subsidize the cost of transportation or lodging.<sup>238</sup> The state can provide alternatives to collect calls to encourage phone conversations between inmates and their relatives.<sup>239</sup>

Incarceration impairs the ability of parents to participate in legal proceedings concerning their children. As a result, the Report provides suggestions to help increase parental understanding of court processes and to facilitate involvement in these cases. According to the Reentry Policy Council, correctional staff should learn the relationship between incarceration and loss parental custody in their states and help inmates stay informed.<sup>240</sup> The Reentry Policy Council suggests that staff encourage inmates to modify their child support payments to take into account their changed circumstances.<sup>241</sup> Additionally, inmates should have the opportunity to participate in court proceedings involving their children, including custody, kinship care, child support and paternity cases.<sup>242</sup>

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233. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 193.

234. *Id.* at 195.

235. *Id.*

236. *Id.* at 196.

237. *Id.* at 197.

238. *Id.* at 197-98.

239. *Id.* at 197.

240. *Id.* at 196.

241. *Id.* at 198.

242. *Id.* at 200.

### *H. Behavioral and Attitude Programming*

Beyond providing family services, the Reentry Policy Council expands the standard definition of treatment to include behavior modification and other attitude adjustment techniques that can help inmates learn to live in their communities without reverting to criminal behavior. According to the Reentry Policy Council, research suggests that some people have cognitive deficiencies that are commonly linked to pro-criminal attitudes.<sup>243</sup> Coping mechanisms developed in prisons can create cognitive patterns that are unhealthy for individuals living in the community.<sup>244</sup> Prisons decrease life management skills, which become essential during post release. This research suggests that programs that address cognitive deficiencies have been associated with reduced recidivism and can provide cost effective solutions to behavior problems faced by correctional institutions.<sup>245</sup>

The Report offers suggestions to correctional facilities regarding ways that staff can employ cognitive therapy programs that focus on recidivism reduction.<sup>246</sup> Community and faith-based instruction can often be instrumental in efforts to increase motivation and help transition inmates back into the community.<sup>247</sup> Community mentoring has also been effective to reduce recidivism.<sup>248</sup> Programs that teach daily skills can also play an important role in efforts to re-shape inmate behavior, attitude and motivation.<sup>249</sup> The Report relies on the research findings that often inmates lacked these basic skills before their incarceration, and long periods of incarceration will cause further deterioration.<sup>250</sup> At the same time, the Reentry Policy Council promotes victim impact panels as a useful method to help inmates understand the effect of their behavior and take responsibility for their actions.<sup>251</sup>

The Reentry Policy Council's research suggests that these treatment tools should be used on both willing, and unwilling inmates.<sup>252</sup> Moreover, facilities should consider focusing services on high-risk inmates, as those inmates can derive a greater benefit from services.<sup>253</sup> Finally, community-based organizations should follow up on inmates who were unresponsive to treatment, as studies show that those who do not receive treatment in prison

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243. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 202.

244. *Id.*

245. *Id.* at 203.

246. *Id.* at 203–04.

247. *Id.* at 205.

248. *Id.* at 206.

249. *Id.*

250. *Id.* at 206–07.

251. *Id.* at 209.

252. *Id.* at 207.

253. *Id.* at 208.

may be more amendable to community services after release.<sup>254</sup>

### *1. Education, Vocational Training, and Work Training*

In an effort to expand focus to fundamentals of life on the outside, the Reentry Policy Council provides suggestions to improve the skill level of the incarcerated population with the goal of helping inmates obtain regular employment after their release. According to studies, there is a high demand for training among the prison population; only 46% of incarcerated individuals have high school diplomas.<sup>255</sup> While many inmates were employed during the months before their arrest, wages among inmates are generally low.<sup>256</sup> The Report states among jail inmates employed during the months before their arrest, the median income was less than 1,000 per month, yet, with this high need, prisons and jails struggle to provide adequate services.<sup>257</sup> Thirty-three percent of jurisdictions offer no educational services at all.<sup>258</sup> However, studies show that providing educational and vocational training can lower recidivism rates and increase employment.<sup>259</sup>

Coupled with the educational training, the Report recommends that correctional facilities provide opportunities for inmates to gain work experience to ease their transition back into their communities.<sup>260</sup> Just over half of the prison population works while incarcerated, and only one-quarter of jails offer institution based jobs.<sup>261</sup> Worse still, the Research Policy Council's research shows that many of these "work experiences" are detached from the needs of the labor market, and rather reflect the needs of correctional facilities.<sup>262</sup> However, studies suggest that recidivism rates still drop among inmates receiving these services,<sup>263</sup> and that such programs reduce tension and idleness within correctional facilities.<sup>264</sup>

The Report acknowledges that the level of appropriate education will vary depending on the individual inmate. In many cases, jail and prison inmates require education in basic skills, such as English-language training and basic literacy.<sup>265</sup> The universal goal of correctional facilities should be

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254. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 208.

255. *Id.* at 212.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 213.

260. *Id.* at 221.

261. *Id.* at 222.

262. *Id.* at 222-23.

263. *Id.* at 223.

264. *Id.*

265. *Id.* at 213.

providing an eighth-grade education to all inmates.<sup>266</sup> High school equivalency or a comparable degree should be available.<sup>267</sup> The Reentry Policy Council recommends that individuals who meet the requirements should have the opportunity to complete post-secondary courses. A partnership with local educational institutions (including public, private, and for-profit schools) can help provide prisons and jails with educational opportunities for their population.<sup>268</sup> Correctional facilities should consider developing a system to allow inmates access to online distance learning and email without jeopardizing security.<sup>269</sup>

In addition to offering basic educational skills, prisons and jails should tailor their training programs to fit specific needs of the community labor market.<sup>270</sup> The Reentry Policy Council suggests that research should be conducted to determine the needs of the job market and correctional facilities should regularly verify that course offerings are keeping up with the current job market and technological advances.<sup>271</sup> Inmates should be particularly encouraged to participate in these sorts of job training programs and cognitive therapy to prepare themselves for these sorts of services.<sup>272</sup> Given limited resources, correctional facilities should develop a system to prioritize allocation of programs among inmates.<sup>273</sup>

To help improve job training programs, the Reentry Policy Council suggests providing work assignments that address the needs of the local job market and working in tandem with institutional vocational training.<sup>274</sup> Again, the Report emphasizes that program planning should be utilized to ensure that every inmate receives training and education that will make her more employable after release.<sup>275</sup> Corrections facilities should attempt to cultivate relationships with local industry, which can best identify training needs and provide positions to inmates after their period of incarceration has ended.<sup>276</sup> Similarly, pre-apprenticeship programs can provide inmates eligibility to enter apprenticeship programs after release and help give inmates a clear career path to follow.<sup>277</sup> Community-based volunteer programs can provide training and working experience for inmates.<sup>278</sup>

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266. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 214.

267. *Id.*

268. *Id.* at 219.

269. *Id.* at 219–20.

270. *Id.* at 215.

271. *Id.* at 216.

272. *Id.*

273. *Id.* at 220.

274. *Id.* at 223–24.

275. *Id.* at 224.

276. *Id.*

277. *Id.* at 225.

278. *Id.* at 226.

*J. Making the Release Decision: Advising the Releasing Authority*

Following the timeline of an inmate's incarceration, the Report focuses next on the release decision. To contextualize the decision process, the Reentry Policy Council recommends developing a multi-factored and evidenced-based assessment of each individual inmate to help inform all boards and government officials involved in release decisions. Despite the general shift away from discretionary release, the Reentry Policy Council's research suggests that individuals released through a discretionary system are more likely to successfully complete a parole term, even accounting for the type of offense and prior record.<sup>279</sup> The Report suggests that the absence of discretion decreases incentives for good behavior, program planning, and treatment during incarceration.<sup>280</sup> Not unimportantly for the Reentry Policy Council, discretionary release gives opportunities for victims and their families to continue to participate in the criminal justice process.<sup>281</sup>

Despite these shrinking possibilities to exercise discretion over release dates, the Report seeks to use any opportunity to improve the process that determines release dates. The Reentry Policy Council suggests that a transition planning committee should convene to oversee the inmate's progress in the implementation of the programming plan and to collect other information to advise the releasing authority, including public safety information, programming plans, and staff updates, family situation, and victim preferences.<sup>282</sup> A validated and comprehensive risk assessment should be conducted to determine the dangers the incarcerated individual poses to the community.<sup>283</sup> Transition teams should make sure to consider a variety of factors (employment, housing, marital status/family, physical/mental illness, substance abuse, community functioning, personal/emotional orientation) to determine both the safety of releasing the individual and the conditions that should be set for that release.<sup>284</sup>

The Reentry Policy Council recommends looking past the characteristics of the individual to the characteristics of the community to make the decision to recommend release. While collecting this information, transition team members should invite victims to provide input on the release of the defendant.<sup>285</sup> The transition team should gauge the support an inmate will receive from the community, both from family members and

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279. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 231.

280. *Id.*

281. *Id.* at 232.

282. *Id.* at 233.

283. *Id.* at 235.

284. *Id.* at 237-38.

285. *Id.* at 238.

service providers.<sup>286</sup> The team should combine the risk assessment with these other outside factors to create a written report that analyzes the information and provides a recommendation.<sup>287</sup>

Utilizing the correct factors represents only part of the release decision equation. Releasing authorities should reconsider, suggests the Report, their release decision practices for inmates with the most serious offenses. Ensuring that high-risk inmates are released with community supervision, instead of denying release until inmates max out on their sentences, will provide enhanced structure and services upon release.<sup>288</sup> The Report contemplates structuring the mandatory release programs to ensure that these high-risk offenders are only released with community supervision provisions.<sup>289</sup> Only conditions tailored to an inmate's strengths and weaknesses should be imposed by the review boards,<sup>290</sup> preferably relying on evidence-based methods in creating a menu of options.<sup>291</sup>

Conditions should be realistic—with only evidence-based treatment programs ordered.<sup>292</sup> Releasing authorities should review an inmate's debts (restitution, child support, court fees, fines) and incorporate them in release orders.<sup>293</sup> To document rationales, releasing authorities should record in writing the reasoning behind all discretionary decisions.<sup>294</sup> Finally, jurisdictions should ensure that mechanisms exist to allow changes and modification of orders for longer supervision.<sup>295</sup>

### *Managing the Key Transition Period*

After the release decision has been, the inmate enters into the transition period. Making a concerted effort to reject the traditional method of reentry planning, which focuses all resources and energy on the weeks just prior to release, the Reentry Policy Council views this transition period as one stage in an integrated process. During this period, planners should focus on issues that could not have been addressed earlier, such as searching for permanent employment and housing. Overall, the Report emphasizes that all transition planning should have an “eye towards permanency.”<sup>296</sup>

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286. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 239, 241.

287. *Id.* at 242.

288. *Id.* at 247.

289. *Id.*

290. *Id.* at 248.

291. *Id.* at 249.

292. *Id.* at 250.

293. *Id.* at 251.

294. *Id.* at 252.

295. *Id.* at 253.

296. *Id.* at 255.



### *Housing*

The Reentry Policy Council stresses as a goal finding housing for inmates before their release. According to their Report, more than 10 percent of those coming in and out of jails and prisons are homeless, and the numbers are even higher for mentally ill inmates.<sup>297</sup> The reasons for this high level of homelessness should be familiar. Affordable housing is scarce.<sup>298</sup> Many affordable housing programs do not admit individuals with criminal records.<sup>299</sup> Inmates often struggle with returning to live with relatives because these families will often face losing their own subsidized homes.<sup>300</sup> Transitions and affordable housing programs are often successful at helping inmates reintegrate, but the demand for space in these programs far exceeds supply.<sup>301</sup> Lack of housing directly affects success rates for inmates reentering their communities. According to a Vera Institute study, parolees admitted to homeless shelters were seven times more likely to abscond after the first month than parolees with stable housing.<sup>302</sup>

The Report recommends transition planners familiarize themselves with housing options in each community, maintain inventories of available housing, and connect these resources to inmates.<sup>303</sup> Planners must understand the legal restrictions for public housing and the implications of criminal histories on eligibility.<sup>304</sup> Developing and routinely updating a housing resource guide can help distribute information between community organizations, transition planners in correctional facilities, and inmates.<sup>305</sup> Using this information, transition planners must determine each inmate's need on an individual basis, taking into account a variety of factors.<sup>306</sup> All housing plans should be developed well in advance of an inmate's release, and transition planners should help educate each inmate about finding and maintaining housing, including their legal rights as tenants in the private market.<sup>307</sup>

When assessing an inmate's family for possible housing, the Reentry Policy Council recommends that planners evaluate the feasibility, safety, and appropriateness of the family situation.<sup>308</sup> Lack of meaningful contact

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297. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 257.

298. *Id.*

299. *Id.* at 258.

300. *Id.*

301. *Id.* at 259.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 263.

306. *Id.* at 263-64.

307. *Id.* at 264.

308. *Id.*

and family violence can present significant barriers to reunifying the family.<sup>309</sup> When considering reunifying a family with a history of domestic violence, transition planners should carefully weigh the housing options against the interest and history of the parties involved.<sup>310</sup> Once a family plan has been developed, transition planners should work to coordinate release with the family and to provide supportive services through community organizations.<sup>311</sup>

One of the obvious impediments to securing housing for newly released inmates is funding. Individuals will have to pay rent regularly, along with a security deposit and usually some additional month's rent.<sup>312</sup> Transition planners should help inmates secure financing from both public assistance programs and, if available, stipends.<sup>313</sup> The Reentry Policy Council provides several examples of creative funding methods to increase the amount of available supportive housing for post-release inmates.<sup>314</sup> The Report even provides ideas for circumventing stricter restrictions attached to popular funding streams, such as the McKinney-Vento Act.<sup>315</sup>

The Report discusses various types of housing that should be considered for post-release inmates. Transition teams should work with local Public Housing Authorities to determine the eligibility and availability of section 8 housing.<sup>316</sup> Private sector and nonprofit housing developers and organization can often provide housing at reduced rates.<sup>317</sup> The Reentry Policy Council proposes creating specifically designated reentry housing, which would provide counseling, benefits advocacy, family reunification, and case management to help former inmates reintegrate into their communities.<sup>318</sup>

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309. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 265.

310. *Id.* at 267.

311. *Id.*

312. *Id.* at 271.

313. *Id.* at 272.

314. *Id.* at 272–78.

315. *Id.* at 278. McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11301; National Coalition for the Homeless (NCH) Fact Sheet #18, McKinney-Vento Act, June 2006 (available at <http://web.archive.org/web/20071203073025/>, <http://www.nationalhomeless.org/publications/facts/McKinney.pdf>); “Homelessness Resource Exchange,” <http://www.hudhre.info/index.cfm?do=viewShpDeskguideB> (The grantee or project sponsor must have evidence on agency letterhead from the institution’s staff that the participant was in the facility more than thirty days and is being discharged within the week before receiving SHP assistance. The grantee and project sponsor must also have information on the income of the participant and what efforts were made to obtain housing, and why, without the SHP assistance, the participant would be living on the street or in an emergency shelter. If the person is being discharged from a prison and the prison is required to provide or arrange housing upon release, the person is not homeless.

316. *Id.* at 280.

317. *Id.* at 276.

318. *Id.* at 274.

*Continuing Care*

In addition to finding housing opportunities, the Reentry Policy Council emphasizes the importance of establishing continuity of care during the transition period. Treatment regimes that begin in jail, for example, must continue after release.<sup>319</sup> Without this continuity, inmates face the risk of serious health repercussions.<sup>320</sup> Often, communities have few resources devoted to connecting recently released prisoners to services and medical care.<sup>321</sup> To combat this problem, correctional facilities have begun to foster partnerships with community-based service providers to ease the transition and studies have shown that collaboration between government officials and mental health workers can decrease the recidivism and hospitalization rates from program participants.<sup>322</sup>

To ensure that care continues after individuals are released, correctional facilities should prepare a prerelease medical history summary for each inmate.<sup>323</sup> This summary should address the inmate's physical and mental and substance abuse history, should be given to the inmate, and, if the inmate consents, shared with local community service providers.<sup>324</sup> Correctional institutions, through discharge planners and others, should work with community-based organizations and the inmates to develop a transition plan that secures post-release treatment of pinpointed inmate needs.<sup>325</sup> That plan should include providing inmates with sufficient medication (not just a prescription) upon release to last, according to protocols outline in the Report, until their follow-up appointment.<sup>326</sup>

*K. Workforce Transition*

A crucial element of the transition plan is connecting an inmate with a job at the point of release. The Report directs policymakers and prison administrators to consider ways to increase employment opportunities available to formerly incarcerated individuals (including programs providing tax benefits and bonding for employers).<sup>327</sup> The Reentry Policy Council supports legislative and judicial action to reform laws that, without any direct link to public safety, restrict the employment of those living with

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319. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 283.

320. *Id.*

321. *Id.*

322. *Id.* at 284.

323. *Id.* at 285.

324. *Id.* at 285–86.

325. *Id.*

326. *Id.* at 290–91.

327. *Id.* at 298.

a criminal conviction.<sup>328</sup> Individuals should bring lawsuits under Title VII of the Civil Rights Act, says the Report, to combat the use of arrest records during job screenings.<sup>329</sup> States should discourage employers and licensing boards from using categorical bans against workers with criminal records.<sup>330</sup> Instead, the aim should be to treat applicants individually in making discretionary hiring decisions.<sup>331</sup> In an attempt to further encourage employers to hire newly released inmates, states can create certificates of rehabilitation that lessen the effects of employment bans in certain job sectors.<sup>332</sup> Community corrections officers should help assist employers by acting as intermediaries between employers and workers.<sup>333</sup>

On a related front, the Reentry Policy Council recommends tackling the problem of unemployment among formerly incarcerated individuals through effective transition planning. But the obstacles are many. Very few prisons and jails provide job placement services,<sup>334</sup> and only a handful of communities offer kindred programs.<sup>335</sup> Even were this situation to begin to change, the limitations on jobs available to formerly incarcerated individuals make the process difficult to successfully manage. And, despite research cited in the Report demonstrating that most inmates would benefit from pre-release programs effectively designed to enhance job skills, few prisons and jails offer such education.<sup>336</sup>

Still, the Reentry Policy Council recommends that transition planners initiate job searches for individuals before the individual inmate enters the community.<sup>337</sup> One Stop Job Centers can provide support services for newly released inmates.<sup>338</sup> The Reentry Policy Council points out that One

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328. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 299.

329. *Id.*

330. *Id.* at 301.

331. *Id.*

332. *Id.* at 302.

333. *Id.* at 303.

334. *Id.* at 307.

335. *Id.* at 308.

336. *Id.* at 307.

337. *Id.* at 308.

338. *Id.* at 309. Workforce Investment Act of 1998, PL 105-220, August 7, 1998 (29 U.S.C.A. § 2801); Pascale Joassart-Marcelli, Alberto Giodrano, DOES LOCAL ACCESS TO EMPLOYMENT SERVICES REDUCE UNEMPLOYMENT? A GIS ANALYSIS OF ONE-STOP CAREER CENTERS, Policy Sciences (access to One-Stops reduces local unemployment, particularly in neighborhoods with limited employment opportunities, one-stops established by the Workforce Investment Act of 1998); PRISONER REENTRY TOOLKIT FOR FAITH-BASED AND COMMUNITY ORGANIZATIONS, U.S. Dep't of LAB, Center for Faith-Based and Community Initiatives (pg 11); Workforce Alliance, PROVIDING ACCESS TO REENTRY SERVICES THROUGH THE WORKFORCE INVESTMENT ACT, April 2006 (discusses the use of WIA funds to establish one-stop job center in Maryland for ex-convicts); Kate Dunham, et al., EVALUATION OF THE WIA PERFORMANCE MEASUREMENT SYSTEM, Social Policy Research Associates, May 2006, *available at* <http://permanent.access.gpo.gov/gpo21860/Evaluation%2520of%2520the%2520WIA%2520Perfo>

Stops may not provide the comprehensive services needed for newly released inmates, but suggests that correctional facilities provide targeted information to inmates by opening satellite One Stops centers within correctional facilities.<sup>339</sup> For example, correctional facilities should consider providing a computer with limited internet access to allow inmates to access job postings on the internet.<sup>340</sup> Prisons and jails should bring employers into facilities.<sup>341</sup> Networking events encourage inmates to begin early planning for their release.<sup>342</sup> Correctional facilities should continue to encourage relationships between inmates and community or faith-based organizations, which after release often help inmates with job searches.<sup>343</sup>

The Reentry Policy Council proposes that correctional facilities should use work-release programs as a transition between work inside the facility and post-release employment.<sup>344</sup> Such programs create connections between employers and facilities, provide forums to educate employers regarding the benefits of hiring formerly incarcerated individuals, and help train inmates for future employment.<sup>345</sup> From the employers' perspective, the correctional facilities usually absorb the risk, pay for transportation, and can guarantee workers for jobs where there may be a labor shortage.<sup>346</sup> The Report recommends that worker release programs partner with community service organizations.<sup>347</sup> These opportunities allow inmates learn new marketable skills and build stronger bonds in their communities.<sup>348</sup> Correctional facility staff should work to encourage public acceptance of these types of programs, as often success of work-release programs depends on community support.<sup>349</sup>

Finally, transition planners should provide information packets to existing inmates. This information would ideally include written referrals

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rmance%2520Measurement%2520System%2520-%2520Final%2520Report.pdf; Ronald D'Amico, FINDINGS FROM A STUDY OF ONE-STOP SELF-SERVICES: A CASE-STUDY APPROACH, Social Policy Research Associates, (December 2009), *available at* [http://wdr.doleta.gov/research/FullText\\_Documents/ETAOP\\_2011-16.pdf](http://wdr.doleta.gov/research/FullText_Documents/ETAOP_2011-16.pdf); Edward G. Cebrien (ed.), *The Workforce Investment Act*, New York: Nova Science Publishers, Inc. (2012); David J. Wright & Lisa M. Montiel, *WORKFORCE SYSTEM ONE-STOP SERVICES FOR PUBLIC ASSISTANCE AND OTHER LOW-INCOME POPULATIONS*, Rockefeller Institute of Government (2010); *Career Resource Centers: An Emerging Strategy for Improving Offender Employment Outcomes, Transition and Offender Workforce Development Bulletin*, Department of Justice (2010).

339. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 309.

340. *Id.* at 310.

341. *Id.*

342. *Id.*

343. *Id.* at 311.

344. *Id.* at 312.

345. *Id.*

346. *Id.* at 313.

347. *Id.* at 314.

348. *Id.*

349. *Id.*

regarding prospective employers or employment resources before release.<sup>350</sup> Correctional facilities should provide each exiting inmate with official documentation of their skills and experiences, including credentials and letters of recommendations.<sup>351</sup>

### *L. Victims and Families*

The importance of a community-centered approach becomes heightened as planners prepare to transition an inmate out of incarceration. The Reentry Policy Council advises transition planners to consider the needs of all relevant stakeholders (families, victims, members of wider community) during the period prior to release.<sup>352</sup>

Research shows that a large number of inmates are released into communities with limited resources.<sup>353</sup> These communities often offer lower employment rates, greater public health risks, higher levels of family distress, and higher percentages of homelessness.<sup>354</sup> The very families inmates return to are often ill-prepared to help handle the challenges.<sup>355</sup> Yet family support can provide crucial help to inmates upon reentry, as studies cited by the Report confirm, and engaging family members in reentry planning can “improve reentry outcomes.”<sup>356</sup> At the same time, the Reentry Policy Council emphasizes preparing victims for the release of the perpetrators. Research shows that victims are often not notified either of the release of victimizers or of the ways those released will be continually held accountable for their actions.<sup>357</sup>

To enhance preparedness, the Report divides the parties affected by the release of an inmate into three groups: victims, families, and community members.<sup>358</sup> The Reentry Policy Council recommends that correctional facilities should ensure that family members receive notification of the prisoner’s impending release.<sup>359</sup> Transition planners should encourage family members to utilize community-based family service providers, who can help educate families on the needs and responsibilities their relative will have after release.<sup>360</sup> The Reentry Policy Council envisions a complex and coordinated system of community networks to provide counseling, safety

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350. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 315.

351. *Id.*

352. *Id.* at 317.

353. *Id.* at 318.

354. *Id.*

355. *Id.*

356. *Id.* at 319.

357. *Id.* at 318.

358. *Id.* at 319, 322.

359. *Id.* at 323.

360. *Id.* at 324.

planning, and other services to these families as they prepare for release.<sup>361</sup> This family services team should assess the needs and strengths of each family to create a plan for the inmate's release.<sup>362</sup> If possible, a family case manager should be assigned to help and monitor the family throughout the reentry process.<sup>363</sup>

The Report separately focuses on child support as a subject for policy makers and correctional facilities to consider reform. The Reentry Policy Council suggests policies be created that are responsive to the needs of recently incarcerated parents.<sup>364</sup> Hefty child support debt can often push parents back into illegal activities.<sup>365</sup> Child support system could emphasize, for example, the regularity of the payments over the size of the payments.<sup>366</sup> And systems could increase the amount of money passed directly through to families receiving government assistance instead of reimbursing the state.<sup>367</sup>

To address the needs of the broader community, the policy counsel recommends notifying key representatives of an inmate's release.<sup>368</sup> States often have mandatory notification for certain crimes and in specific situations.<sup>369</sup> In considering notification beyond statutory mandates or information regarding particularized threats, the Report recommends that the transition team should work in conjunction with local law enforce to come to a consensus.<sup>370</sup> This decision should be made by established criteria, including a risk assessment and a review of the individual's criminal history. Correctional officials should seek community impute to determine this set of criteria.<sup>371</sup>

### *M. Benefit Identification*

The Reentry Policy Council focuses on providing better access to public benefits as way to assist inmates during the transition period. According to the Report, the system of public benefits provides a critical safety net for recently incarcerated individuals. Unfortunately, the benefits are often hard to obtain. First, the application process often involves a long

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361. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 324.

362. *Id.* at 325–26.

363. *Id.* at 324–26.

364. *Id.* at 327.

365. *Id.*

366. *Id.*

367. *Id.* at 328.

368. *Id.* at 329.

369. *Id.*

370. *Id.* at 330.

371. *Id.*

delay.<sup>372</sup> This will leave individuals without help during the crucial transition period. Even more seriously, many inmates will be ineligible for benefits. The Reentry Policy Council outlines the numerous restrictions that prevent individuals from receiving public benefits after criminal convictions. To respond to these problems, the Report highlights two goals. First, correctional facilities should help obtain benefits for inmates exiting their institutions.<sup>373</sup> Second policy makers should reconsider the policies that ban convicts from receiving federal benefits.<sup>374</sup>

For correctional facilities, the Reentry Policy Council created a list of recommendations to connect more inmates with benefits. To start, correctional staff (and those with whom they routinely deal) must be familiar with public benefits policy and should help inmates take advantage of these benefits. Interagency collaboration and effective screening of applicants can help ensure that eligible individuals submit prompt and complete application.<sup>375</sup> Institutions should ensure that documents issued by the department of corrections can be used as valid documentation for obtaining proper identification, which is often necessary for benefit applications.<sup>376</sup> While most inmates are not eligible for benefits while incarcerated, veteran's benefits are an important exception.<sup>377</sup> Correctional facilities should ensure that all eligible veterans are receiving benefits as soon as possible.<sup>378</sup> Similarly, while many inmates will not qualify for TANF benefits because of restrictions against individuals with certain criminal convictions, individuals leaving prison may be eligible for non-reoccurring payments, often exempt from these types of regulation.<sup>379</sup> Inmates should be advised of their eligibility regarding these funding opportunities.

Beyond institutional changes in correctional facilities, the Report suggests that state policy makers should limit the harm of federal guidelines restricting public benefits for individuals with criminal convictions. States should ensure timely access to Medicaid after release by suspending, instead of terminating, Medicaid during incarceration.<sup>380</sup> TANF regulations should be revisited. One easy fix that states could employ would be adopting a narrow interpretation of the "in term violation of parole or probation," a condition that restricts benefits for many newly released

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372. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 333.

373. *Id.* at 331.

374. *Id.*

375. *Id.* at 335.

376. *Id.* at 337.

377. *Id.* at 336.

378. *Id.*

379. *Id.* at 340.

380. *Id.* at 339.



beneficiaries.<sup>381</sup> Public Housing Authorities (PHAs) have discretion in implementing federal housing policies. PHAs should consider adopting standards that consider individual circumstances rather than categorical restrictions.<sup>382</sup> States should also ensure that parents and children do not lose their Medicaid coverage when their TANF cases are closed due to criminal convictions.<sup>383</sup>

#### *N. Supervision Strategy*

The Report encourages policy makers to re-prioritize the standard conditions of release and develop a supervision strategy that encourages compliance. According to the Reentry Policy Council research, only 45 percent of parolees completed their parole term.<sup>384</sup> The completion rate was 70% in 1984.<sup>385</sup> Moreover, the routine reaction of many departments to increase the intensity of supervision after small violations has not reduced recidivism.<sup>386</sup> Instead, research shows that a mixture of treatment and supervision more effectively changes behavior and reduces crime.<sup>387</sup> The Reentry Policy Council reports that validated assessment tools can help design treatment and supervision strategies to better meet individual need.<sup>388</sup> Importantly, the Report cites studies of criminal supervision in Boston and D.C., which demonstrate conditions clearly communicated to and agreed upon by inmates have a higher compliance rate.<sup>389</sup>

To help reshape the current system of community supervision, the Reentry Policy Council suggests engaging community members, including community corrections, law enforcement, and community-based organizations, to serve on a transition planning team.<sup>390</sup> These team members should work to plan and coordinate all aspects of a prisoner's reentry.<sup>391</sup> The team should rely upon information compiled by correctional officials throughout the inmate's stay at the correctional facilities. This information should be gathered using validated tools to determine risk assessments, parole decisions, and post-release needs.<sup>392</sup>

Community corrections officers should be assigned to each individual

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381. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 340.

382. *Id.* at 341.

383. *Id.* at 341-42.

384. *Id.* at 344.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 345.

390. *Id.*

391. *Id.* at 346.

392. *Id.* at 347.

well before his or her release date.<sup>393</sup> The Report suggests connecting inmates to community corrections officers sometime between one year and three months before the inmate's release, depending on the resources of the community corrections department and the needs of the inmates.<sup>394</sup> Local law enforcement can provide additional supervision for newly released individuals.<sup>395</sup> To better connect state prison inmates to their communities, correctional institutions should consider moving prisoners to county jails prior to their release.<sup>396</sup> Finally, prior to release, every inmate should receive a written copy of his or her terms and conditions prior to release and a lucid explanation each provision and the entire document's impact.<sup>397</sup>

### *O. Community Supervision and Post-Release Life*

Because the vast majority of inmates will live with some level of community supervision, and because a wide range of bipartisan elected and appointed officials and all with whom they work have been made acutely aware of the extremely costly and uneven practices that pervade state and local agencies, the Report focuses particularly on reforming community supervision system.<sup>398</sup> That is a tall order. Over the past thirty years, caseloads have increased dramatically and are rarely assigned by geography.<sup>399</sup> Officers monitor individuals in vastly different parts of a community.<sup>400</sup> Because research suggests that early supervision is exceedingly important to ensure that individuals successfully complete their parole,<sup>401</sup> the Report recommends concentrating resources on the period directly following release.<sup>402</sup> The degree of contact should correspond to the level of risk presented by the individual.<sup>403</sup> Throughout the supervision period, strategies should change to reflect the shifting needs of the individual, his family, and the greater community.

The Reentry Policy Council recommends that community corrections officers should become familiar with the community in which their supervisees live and provides suggestions to help accomplish this goal.<sup>404</sup> Establishing numerous satellite offices can facilitate a greater connection

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393. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 348.

394. *Id.* at 349-50.

395. *Id.* at 351.

396. *Id.* at 352-53.

397. *Id.*

398. *Id.* at 357.

399. *Id.* at 359-360.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* at 361.

404. *Id.* at 363.

between officers and communities.<sup>405</sup> Wireless, web-based technology can allow officers to access information and case files from varied locations.<sup>406</sup> Developing community-based networks can help create a larger team to supervise and to support individuals. Community corrections officers can establish connections with local law enforcement to better monitor their parolees.<sup>407</sup> Officers should foster relationships with parolee's family, friends, religious leaders, and service providers.<sup>408</sup> These relationships can provide community corrections officers with information regarding the parolee's history and progress.<sup>409</sup>

Digging deeper still, the Reentry Policy Council recommends that community corrections officers should routinely assess the success of each inmate's transition.<sup>410</sup> Modifications should be made to take into account achievements and failures,<sup>411</sup> and they can include decisions to increase or decrease supervision, which should be made using objective and validated assessments tools.<sup>412</sup> Community corrections officers should conduct ongoing assessments of the risks posed by the offender to the community.<sup>413</sup> Assessments and supervision should be conducted with the understanding that people often require an adjustment period and that relapse behavior does not always mean past offenders will commit new crimes.<sup>414</sup> The supervision strategy should incorporate responses to an inmate's failure to meet the established goals.<sup>415</sup> In a potentially huge cost-saving alteration of existing practices, these responses should attempt to react to parolee setbacks without immediately relying on incarceration to remedy the situation.<sup>416</sup>

Beyond understanding the risks posed by inmates, the Reentry Policy Council strongly urges community corrections officers to understand and monitor physical health, mental health, and substance abuse problems.<sup>417</sup> Continuity of care remains a big problem during transition. High caseloads may reduce the attention community corrections officers can give to their parolees.<sup>418</sup> To make matters worse, within the geographical boundaries of their own communities, parolees will likely have access to very few health

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405. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 362.

406. *Id.* at 364.

407. *Id.* at 365.

408. *Id.* at 365–67.

409. *Id.* at 366.

410. *Id.* at 368.

411. *Id.*

412. *Id.*

413. *Id.* at 369.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 370.

418. *Id.* at 371–72.

services to treat these illnesses.<sup>419</sup>

Community corrections officers should receive training in the special needs of supervisees with mental illnesses.<sup>420</sup> To facilitate communication, individuals should be encouraged to release their medical records to their supervising officers.<sup>421</sup> Officers should provide a system of graduated sanctions for violations of mental health treatment programs. Importantly, officers should not punish parolees who cannot receive the treatment they need because service are unavailable or transportation prohibitively difficult or expensive.<sup>422</sup> Officer should offer positive incentives to encourage parolees to follow practicable treatment plan.<sup>423</sup>

The Report suggests officers should be aware of the special needs surrounding supervisees with substance abuse problems,<sup>424</sup> indeed, should monitor these individuals and know how to help them seek treatment.<sup>425</sup> The Reentry Policy Council contemplates that officers will understand that those will substance abuse problems will often relapse during their transition period and should develop plans to deal with those relapses.<sup>426</sup> Individuals with substance abuse issues, emphasizes the Report, should be regularly tested and community-based organizations can partner with officers to test and treat drug abuse.<sup>427</sup> Corrections officers should ensure that immediate services are provided to individuals after a positive drug test.<sup>428</sup> Overall, the Reentry Policy Council suggests monitoring individuals and providing a combination of sanctions and incentives to motivate good behavior.<sup>429</sup>

Drawing on the lessons of widely accepted research, the Report specifically highlights housing and pointedly urges community correctional officers to help newly released inmates secure a permanent place to live. Policies and programs should be implemented to ensure that people leaving prisons do not enter emergency homeless shelters or become homeless.<sup>430</sup> Individuals living in homeless shelters after release are much more likely to commit new crimes.<sup>431</sup> Emergency homeless shelters are expensive for the state.<sup>432</sup> Transition planners and community corrections officers should

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419. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 372.

420. *Id.* at 373.

421. *Id.* at 374.

422. *Id.* at 375.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 376–377.

428. *Id.*

429. *Id.* at 378.

430. *Id.* at 380.

431. *Id.*

432. *Id.*

work to prevent newly released individuals from residing in these shelters. Ultimately, the goal should be connecting the inmate with stable, long-term housing.<sup>433</sup>

Reflecting evidence both formally empirical and convincingly anecdotal, the Reentry Policy Council calls upon the community corrections offices to help addresses the difficulties facing newly released inmates entering the job market. The obstacles for obtaining and retaining viable employment are both many and layered.<sup>434</sup> Debilitating stigma surrounds individuals with criminal records.<sup>435</sup> Ex-offenders often have minimal job skills and education.<sup>436</sup> They may struggle with employment logistics, such as the proper documentation, consistent childcare, and reliable transportation.<sup>437</sup> Finally, physical health, mental health, and substance abuse issues prevent ex-offenders from finding and maintaining full employment.<sup>438</sup>

The Reentry Policy Council suggests updating community corrections policy to encourage rather than discourage employment.<sup>439</sup> Officers should learn to assist people with criminal records to surmount the legal and logistical obstacles to employment.<sup>440</sup> Once individuals obtain employment, the Report recommends officers help minimize sigma by making themselves as inconspicuous as possible during visits to the job site.<sup>441</sup>

Finally, the Report addresses the controversy surrounding the consequences of parole and probation violations aiming to balance the importance of providing consequences to reoffending supervisees against the convincingly documented price of re-incarcerating individuals for minor (often technical) violations. The Reentry Policy Council recommends giving community corrections officers a range of options. These options should both reinforce positive behavior and address noncompliance.<sup>442</sup> For noncompliance problems, the Report urges graduated responses, including both sanctions and incentives, delivered in a timely manner.<sup>443</sup>

In doing so, the Reentry Policy Council follow a large number of mainstream experts who for years have argued that a huge percentage of those incarcerated are there because of technical parole violations that are

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433. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 381.

434. *Id.* at 383.

435. *Id.* at 384.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 385.

440. *Id.* at 386–87.

441. *Id.* at 385–86.

442. *Id.* at 390.

443. *Id.*

not new crimes and do not predict future criminal behavior.<sup>444</sup> Already in 1997, according to the Report, fewer than 1 in 3 parolees returned to prison had committed a new offense.<sup>445</sup> To make matters worse, parole systems often lack consistency in the applications of sanctions, often with inexplicably large gaps between technical violations and punishment.<sup>446</sup> Treatment orientated responses and rewarding positive behavior, conclude studies cited in the Report, can often be more effective than re-incarceration.<sup>447</sup>

### *P. Sanctions*

The Report suggests creating an organized structure to guide the implementation of sanctions for community corrections officers.<sup>448</sup> Sanctions should include treatment- and program-based options.<sup>449</sup> Mitigating and aggravating factors should be considered.<sup>450</sup> Parole officers should consider revocation and re-incarceration as the most serious option available for addressing violations.<sup>451</sup> Even when incarceration is employed, officers should consider using short-term, “shock” incarceration as a sanction, rather than revoking parole for the full term.<sup>452</sup> The Reentry Policy Council cautions officers to remember that maxed-out inmates will be released unsupervised into the community.<sup>453</sup> According to the Report, releasing inmates without any type of supervision often presents a more serious risk than allowing an inmate to remain on parole or probation after a technical violation.<sup>454</sup>

The Reentry Policy Council recommends that individuals in violation of their conditions should be assessed, using appropriate tools designed to consider an individual’s particular issues, for the level of response needed.<sup>455</sup> For technical violations, community corrections officers and judicial officers should restructure the conditions and expectations to correct the behavior.<sup>456</sup> Not every violation should be considered equally serious.<sup>457</sup> For all but the most serious violations, community-based

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444. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 391.

445. *Id.*

446. *Id.* at 392–93.

447. *Id.* at 392.

448. *Id.* at 393.

449. *Id.*

450. *Id.*

451. *Id.* at 394.

452. *Id.* at 395.

453. *Id.*

454. *Id.*

455. *Id.* at 396.

456. *Id.* at 397, 404.

457. *Id.* at 397.

responses should be employed to help the offender retain positive connections in the community.<sup>458</sup>

Corrections officers should collaborate with community-based service providers and family members to develop specialized approaches to handle violations, while still remaining sensitive to legally required confidentiality.<sup>459</sup> Community representatives should be given a role in designing a system of graduated responses that addresses the needs of their neighborhoods.<sup>460</sup> Crime victims should be informed of the imposition of graduated responses.<sup>461</sup> Along with sanctions, community corrections officers should ensure that meaningful and positive reinforcement to encourage compliance and pro-social behavior.<sup>462</sup>

### *Q. Epilogue*

At the end of Part II, the Reentry Policy Council reminds readers that many barriers to successful reintegration will exist long after parole or probation restrictions are removed.<sup>463</sup> Higher education grants are hard or impossible to procure for individuals with drug convictions.<sup>464</sup> States often restrict individuals with certain criminal convictions from becoming foster or adoptive parents.<sup>465</sup> Nearly all states place some restrictions on voting for individuals with certain criminal convictions.<sup>466</sup> Yet the Report does not address these or many other possible policy changes because the Reentry Policy Council asserts that there is no "consensus regarding the merit or usefulness."<sup>467</sup> Indeed, the Report avoids assessing the merits of removing such barriers and merely notes the relevance of these so-called collateral consequences to the reentry process.<sup>468</sup>

## **Part III: Elements of Effective Health and Social Services**

In the introduction to the third section of the Report, the Reentry Policy Council asserts that reentry success is predicated on providing effective health and social services to former inmates after incarceration and yet acknowledges that such services are not at all consistently available

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458. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 398.

459. *Id.* at 399, 403.

460. *Id.* at 400.

461. *Id.* at 401.

462. *Id.* at 398–99.

463. *Id.* at 406.

464. *Id.* at 407.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

or accessible.<sup>469</sup> The final section of the Report provides goals and recommendations to improve these services. The Reentry Policy Council focuses specifically on a variety of systems that affect returning inmates, including housing, work force development, substance abuse treatment, mental health care, children, and family services and physical health care.

### *A. Housing*

The Report encourages communities to develop affordable rental housing, maximize existing housing, and eliminate barriers to the creation of affordable housing.<sup>470</sup> The Reentry Policy Council begins by describing the overwhelming lack of housing that plagues many communities and the effect that housing shortages can have on those returning from prison or jail.<sup>471</sup> The deterioration and gentrification of affordable housing has created a housing crisis, not least for those inmates returning to their communities.<sup>472</sup> The housing shortage is even more serious for those needing specialized housing with supportive services.<sup>473</sup> The Report identifies key issues preventing the creation of affordable housing. In particular, public funds for housing, never plentiful, have declined severely and financing must often be leveraged from private investors.<sup>474</sup>

In an effort to give readers a working understanding of the subsidized housing system, the Report identifies the federal and state housing agencies and programs that exist to support and fund housing development.<sup>475</sup> Beyond the HUD programs, the Reentry Policy Council discusses the federal tax incentives, such as the Housing Tax Credit Program.<sup>476</sup> Housing advocates should educate policy makers, states the Report, regarding the affordable housing shortage and the need for supportive housing for individuals with special needs.<sup>477</sup> The Resource Policy Council recommends the Corporation for Supportive Housing's Resource library as a helpful guide.<sup>478</sup>

To help overcome possible hurdles to creating more housing opportunities, the Report advises policy makers on ways to take full advantage of existing funding sources for housing developments. The Report suggests that coordination between government entities and private

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469. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 13, at 411.

470. *Id.* at 412.

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.* at 413.

475. *Id.* at 414.

476. *Id.* at 416.

477. *Id.* at 417–18.

478. *Id.* at 418.



citizens can help maximize available resources by identifying overlapping and inefficiently used funds.<sup>479</sup> Because HUD mandates coordination for jurisdictions applying for Community Development Block grants, many public and private actors already engage (if only by coercion) in cooperative efforts encouraged by the Reentry Policy Council.<sup>480</sup> Beyond the standard forms of subsidized housing funding, the Report recommends utilizing non-traditional resources to help expand affordable housing.<sup>481</sup> Funding streams dedicated to health, mental health, and homelessness assistance can sometimes be commandeered for housing related purposes.<sup>482</sup> Non-housing agencies can provide other valuable resources (unused buildings or land).<sup>483</sup> The Report provides suggestion for community outreach to help overcome any community resistance that affordable housings often face.<sup>484</sup>

### *B. Work Force Development*

The goal, states the Report, is to equip all job seekers with the skills to find and maintain stable and sufficiency-enabling employment and, at the same time, to fulfill the needs of the local business community.<sup>485</sup> Even in the best of circumstances, it can feel daunting to try helping former inmates achieve stable employment within an economy that provides few job opportunities to low-skill workers.<sup>486</sup> Yet the Reentry Policy Council emphasizes the strong link between recidivism and unemployment, and the crucial need to implement policies to increase employment if reentry is to succeed.<sup>487</sup>

First, the Report outlines the problems that face reentering inmates in the current economic climate and the solutions that exist to help these inmates. Many people seeking permanent full-time employment wind up forced to settle for far less. Currently available jobs are often part time, low-skill, low-pay service jobs.<sup>488</sup> At the time of the Report, the economy had experienced very modest job growth. The growth, however, had primarily been concentrated in service and retail jobs, both characteristically offering minimum wage salaries and part-time hours.<sup>489</sup>

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479. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 419.

480. *Id.*

481. *Id.*

482. *Id.* at 420.

483. *Id.*

484. *Id.*

485. *Id.* at 423–24.

486. *Id.*

487. *Id.*

488. *Id.* at 424–25.

489. *Id.* at 425.

To highlight the predicament, minimum-wage employment offers an income both too low to keep a single parent and child above the poverty line and too high to qualify for public benefits.<sup>490</sup>

In describing the background of the major players in the field of employment-related services, the Reentry Policy Council focuses primarily on the national workforce systems and programs. Temporary Assistance to Needy Families (TANF), the Workforce Investment Act (WIA), the United States Commerce Department, and the Employment and Training Administration are depicted as the major sources of resources for employment-related services.<sup>491</sup> The Report highlights “One-Stop” centers and “Workforce Investment Boards” as potentially valuable forces in employment-based services, and yet concedes services offered by such centers and boards can vary widely across the country.<sup>492</sup> The Reentry Policy Council mentions additional public and private institutions providing employment services, including the public university and community college system.<sup>493</sup>

In an attempt to improve the services available to reentering prisoners, the Report suggests increasing collaboration within and across systems, primarily government sectors involved with providing aid to unemployed workers (local Work Force Investment Boards, One-Stop centers, and community employers).<sup>494</sup> The goals of this collaboration would include meeting the business needs of the community, improving outreach to under-represented and marginalized communities, fostering economic development, and creating a comprehensive vision of workforce development for the community.<sup>495</sup> The Reentry Policy Council encourages a market-driven approach that presupposes and requires business need to provide the foundation for any training or job placement program.<sup>496</sup>

The Reentry Policy Council urges all job programs to be alert to obstacles to employment.<sup>497</sup> According to the Report, “high performing One-Stops” have established partnerships with a variety of service providers, including substance abuse, mental health, and family counseling, to help overcome obstacles preventing prospective employees from securing and maintaining employment.<sup>498</sup> Employment services should be located in neighborhoods where need is highest.<sup>499</sup> Ideally, these locations

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490. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 425.

491. *Id.* at 427.

492. *Id.* at 428.

493. *Id.*

494. *Id.* at 429.

495. *Id.*

496. *Id.* at 429–30.

497. *Id.* at 431.

498. *Id.*

499. *Id.* at 432.

should house all necessary employment services under one roof.<sup>500</sup> Programs should be monitored and evaluated, through assessments of job placement rates, retention rates, and earning gains, to ensure the quality and effectiveness of services.<sup>501</sup>

### *C. Substance Abuse Treatment*

In light of the pervasiveness of substance abuse among the prison population, concludes the Report, the need for treatment is "the rule, rather than the exception."<sup>502</sup> Research suggests that substance abuse programming reduces recidivism.<sup>503</sup> As a result, the Reentry Policy Council argues that ensuring that proper treatment is provided to the post-release population is essential for a "safe and successful reentry."<sup>504</sup> Acknowledging that the major problem is that such services are not being provided, the Report cites three major gaps in treatment.<sup>505</sup> First, many individuals exhibit symptoms but deny the need to seek services.<sup>506</sup> Second, many individuals know they need services, but either make no effort to seek treatment or seek treatment without success.<sup>507</sup> Finally, individuals are often treated for abuse at a lower level of intensity than their condition demands.<sup>508</sup> The Reentry Policy Council holds responsible state, federal, and private insurers for these treatment gaps.<sup>509</sup>

In formulating the recommendations for increasing the quality of services provided in communities, the Reentry Policy Council aims to fulfill the White House's drug policy guidelines, which target a 10% reduction in current use of illegal drugs in two years, and a 25% reduction in drug use in five years.<sup>510</sup> To meet these goals, the Report recommends encouraging service providers to utilize evidence-based methods of treatment.<sup>511</sup> Three key elements are often missing from treatment:<sup>512</sup> Program (1) are not long enough (partly due to insurance and Medicaid limitations on payments),<sup>513</sup> (2) do not offer the most intense therapy (often requiring in-patient

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500. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 432.

501. *Id.* at 433.

502. *Id.* at 434.

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.* at 435.

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* at 437.

511. *Id.* at 438.

512. *Id.* at 439.

513. *Id.*

treatment),<sup>514</sup> and (3) do not always offer evidence-based treatment regimens (instead relying upon less effective methods).<sup>515</sup> Precisely to increase the quality of the programs, the Reentry Policy Council recommends that service providers make an investment in a quality substance abuse workforce, including actively recruiting and providing higher than current levels of compensation to qualified candidates.<sup>516</sup>

Shifting emphasis, the Reentry Policy Council provides suggestions for governmental policy makers attempting to engage in drug reform. The Report recommends that policymakers require existing and new treatment programs to track a wide range of outcome variables (criminal activities, drug relapses, and employment status).<sup>517</sup> Policy makers should ensure, too, that funding and services are better coordinated and that states be given greater flexibility in spending federal money.<sup>518</sup> Finally, public awareness campaigns should promote an understanding that addiction is a preventable and treatable disease.<sup>519</sup> These education campaigns can help reduce stigma surrounding those struggling with substance abuse and will encourage seeking and supporting those who seek treatment.<sup>520</sup>

#### *D. Mental Health Systems*

According to the U.S. Department of Justice, 16% of the jail and prison population suffers from a serious mental illness.<sup>521</sup> Many of these individuals suffer from co-occurring issues, including substance abuse, histories of physical or sexual abuse, and homelessness.<sup>522</sup> The health professions have developed highly effective medications and rehabilitation models. But often these interventions are not directed toward those most in need, who already may avoid the stigma of seeking treatment.<sup>523</sup>

In a sweeping statement, the Reentry Policy Council recommends that, upon release, former inmates should have access to individualized, accessible, coordinated, and effective community-based mental health treatment services.<sup>524</sup> To meet these ambitious goals, the Report provides concrete examples of ways to improve services. The Reentry Policy Council encourages state mental health agencies to develop and maintain

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514. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 439–40.

515. *Id.* at 440.

516. *Id.* at 443–44.

517. *Id.* at 440.

518. *Id.* at 441.

519. *Id.* at 444.

520. *Id.*

521. *Id.* at 445.

522. *Id.*

523. *Id.* at 445–46.

524. *Id.* at 445.

partnerships with other service providers to reduce fragmentation and ensure a full spectrum of effective care.<sup>525</sup> In order to combat many states' tendency to encourage service providers to provide affordable treatment, even if ineffective, the Report urges providers to maximize the resources available to those offering demonstrably helpful care.<sup>526</sup>

Evidence-based practices should be utilized in conjunction with the New Freedom commission established by President Bush.<sup>527</sup> The Report advocates training mental health workers in cultural competency,<sup>528</sup> in guiding patients to successfully apply for public benefits,<sup>529</sup> and developing community education programs to help de-stigmatize mental illness.<sup>530</sup> Families and patients should be included in the mental health planning and service delivery, both in treating individual patients and working with policy makers to re-shape the care provided in the community.<sup>531</sup>

### *E. Children and Family Service*

Policy makers should promote interagency efforts to enhance human services programs that support families and to ensure the availability of effective community-based programs to serve that population.<sup>532</sup> The Report highlights the heavy burden placed on family members, often grandparents, when parents are incarcerated. Children without available relatives face placement in foster care.<sup>533</sup> Many of these families find support through public benefits programs (TANF, Medicaid, food stamps) during a parent's incarceration.<sup>534</sup> When parents return from jails and prisons, the need for services and support often only increases, illuminating why domestic violence and family counseling and early childhood programs can prove vital.<sup>535</sup>

Human service agencies should provide better access to services.<sup>536</sup> The Reentry Policy Council suggests increasing the number of satellite offices that are co-located with other types of supportive services, streamlining intake to reduce redundant paperwork and repetitive office

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525. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 450.

526. *Id.*

527. *Id.* at 452.

528. *Id.* at 454–55.

529. *Id.* at 452.

530. *Id.* at 455.

531. *Id.* at 453–54.

532. *Id.* at 456.

533. *Id.* at 456–57.

534. *Id.* at 458.

535. *Id.*

536. *Id.* at 53–73. The Report includes a long discussion regarding the different funding streams for these possible reforms. This includes a list of current sources and possible uses for this money.

visits, and facilitating a range of programs that create better outreach and referral services.<sup>537</sup> Human services should conduct family assessments for individuals needing services and should take a “family-centered” approach to improve service delivery.<sup>538</sup> Program staff should develop service plans in consultation with family members, and providers must remain aware of the burden services can impose upon families.<sup>539</sup> Program providers should consider effective alternatives to sanctions, which often burden the most disadvantaged families, already struggling with compliance.

The Report provides a special list of suggestions for child welfare systems.<sup>540</sup> The federal government should reprioritize funding for child welfare to encourage states to provide more services.<sup>541</sup> Courts should improve judicial oversight of child welfare cases, including parental access to proceedings.<sup>542</sup> States should implement policies to encourage kinship care arrangements rather than foster care settings with strangers, and these kinship families should receive supportive services.<sup>543</sup> The child welfare service mandate should be expanded to include and improve services specifically designed for families of incarcerated parents through collaboration with corrections departments.<sup>544</sup> Finally, permanency planning should take into account the special challenges of families, especially families with parents who have prison sentences long than the statutory presumption for termination of parental rights.<sup>545</sup> The Report emphasizes that all parents should be given a fair opportunity to reunite with their children.<sup>546</sup>

On this front too, the Reentry Policy Council stresses the importance of information sharing and interagency cooperation.<sup>547</sup> Developing collaboration between service providers and harmonizing policies can help achieve an expansive network of coordinated services.<sup>548</sup> Similarly, human service agencies should partner with community-based organizations to improve service access and delivery.<sup>549</sup> Such partnerships can help individuals who live just above eligibility thresholds for public benefits or family members not directly served by social services but in need of

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537. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 463.

538. *Id.* at 464.

539. *Id.* at 464–65.

540. *Id.* at 465–66.

541. *Id.* at 466.

542. *Id.*

543. *Id.*

544. *Id.* at 466–67.

545. *Id.* at 467.

546. *Id.*

547. *Id.* at 467–68.

548. *Id.* at 468.

549. *Id.* at 469.

support.<sup>550</sup>

### *F. Physical Care System*

In the arena of physical health care, the Reentry Policy Council strives to increase positive health outcomes, cut costs, and reduce the transmission of communicable diseases by improving access to and raising the quality of existing public and private care.<sup>551</sup> For newly released inmates, accessing quality health care can be challenging,<sup>552</sup> particularly when medical care is prohibitively expensive for many in the United States.<sup>553</sup> The Report highlights the inequity of medical access by describing the disastrous health effects of denying medical treatments and screenings to uninsured individuals and families (except for emergency medical visits).<sup>554</sup> Moreover, the Report outlines the different interactions between federal, state, and local health agencies.<sup>555</sup>

The Reentry Policy Council recommends improving access for the working poor by increasing cost containment strategies and maximizing insurance coverage.<sup>556</sup> Policymakers should assess different cost-control approaches, such as malpractice reform, group purchasing of services, better regulation of drug companies, or a reduction of Medicare or Medicaid benefits. Overall, saving money on health insurance payouts would drive down premiums and make insurance more affordable.<sup>557</sup>

Beyond these big policy goals, the Report provides still more practical suggestions for improvements in medical services provide to low-income communities. The Reentry Policy Council recommends that community-based health care providers offer comprehensive medical treatment, including health promotion, screening and dental care.<sup>558</sup> The Report suggests better coordination between primary care providers and mental health and substance abuse services to help better treat co-occurring disorders.<sup>559</sup> Service providers should implement empirical evaluations to regulate the quality of the care. Federal and state policy makers can encourages these evaluations though monetary incentives, such as the pay-for-performance system of immunizations in Rhode Island.<sup>560</sup> Ultimately,

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550. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 469–70.

551. *Id.* at 471.

552. *Id.*

553. *Id.* at 472.

554. *Id.* at 472–473.

555. *Id.* at 473–475.

556. *Id.* at 476.

557. *Id.*

558. *Id.* at 477–78.

559. *Id.* at 478–79.

560. *Id.* at 480–81.

the Report recommends that public health departments establish strong bonds with personal health care services to improve patient care and protect public health.<sup>561</sup>

### III. The Biases Driving The Report

I aim to make explicit certain predispositions supporting and shaping the Reentry Policy Council's Report. With a 632-page document, I shall not attempt to be wholly comprehensive. Instead, I will highlight only certain biases. These predispositions—and their ideological tilt—will suggest how the Reentry Policy Council's own utopian ambitions may be doomed, and why targeted mass incarceration and social control are buttressed by the Report's prescriptions.

You might think that many bipartisan mainstream reformers would want to see predispositions brought to the surface and examined. Deep biases can prove pivotal to diagnosis, framing problems, offering policy statements and recommendations, and anticipating and dealing with identifiable challenges. How better, then, to freshly scrutinize the design and implementation of the Report? How better to evaluate the likelihood of giving localized life to each and every policy statement and recommendation? How better to help insure a real shot for a comprehensive vision of reentry that, if implemented, the Reentry Policy Council regards as guaranteeing success and that so many others regard as potentially transformative?

But even the utopians among mainstream reformers will not likely react that way. In publicly disassembling the architecture of the Report, I am violating the unspoken norm that pervades the Reentry Policy Council and all those in good standing with them: At all costs, you do not identify, much less acknowledge, CSG's responsibility for creating and continuing to sustain the cruelly reactionary (and, yes, fantastically expensive) "tough on crime" movement that generated the very gigantic reentry problems we now face. You do not bring to the surface for all to see the race- and class- and gender- and geography-skewed ideological biases that provide the foundation for both the highly promoted and widely acclaimed Report and the targeted mass incarceration and social control to which the Reentry Policy Council's vision of reentry responds.

For anyone related to the Reentry Policy Council visibly to take seriously analyses about CSG's responsibilities and continuing ideological biases would risk ostracism in one form or another. Those who make up the Reentry Policy Council do not want to be seen as openly considering what the Report artfully buries, obscures, or treats as brute facts without origins. Those who care about remaining in good standing with the Reentry

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561. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 481.



Policy Council's expansive national networks do not want to endanger their credit rating in grant application processes, their individual reputation in the consultant-contract game, their capacity to cut various informal and formal side-deals.

Even apart from keeping your job and your income streams flowing, those within and associated with the Reentry Council (perhaps especially the idealists) need to be regarded as imaginative and critical thinkers within acceptable boundaries. They do not want to be perceived as offering or even considering visions, approaches, categories, stories, or arguments that others within their bi-partisan circles regard as "off-the-wall." That's a way to lose a seat at the table, reputation, a voice anyone seeks out—even if you continue to earn a paycheck.

Off-the-wall variously means unacceptable, unthinkable, unimaginable, or plain whacko. That's not because anything inherent about an "off-the-wall position," say, is straight-out crazy. To the contrary, off-the-wall says almost everything about an ideological center of gravity and almost nothing about soundness or past or future appeal.<sup>562</sup> Indeed what it means to be a knowledgeable insider (in the Obama Administration or the CSG or you name it) is the very capacity to recognize—to just "know"—what will and will not be perceived as off-the-wall. Make no mistake, though, off-the-wall is typically a belittling put-down and, at least where ideological discipline proves central to good standing, can foreshadow ostracism.

Of course, what is "off-the-wall" can change over time and become acceptable to consider and even adopt. Stunning historical examples abound. Think only of formally prohibiting sexual harassment or constitutionally forbidding states from making sodomy illegal. Indeed, the Reentry Policy Council's Report itself such a transformation and one far more rapid than most. By the 1980s, ambitious reentry programs became nearly unspeakable within bipartisan mainstream institutions, not least CSG. The "tough on crime" leaders and masses had condemned rehabilitation as utterly incompatible with the punishment the criminal justice system should deliver. And these leaders and masses, including CSG, regarded reentry programs as inextricably linked to (an expression of) rehabilitation. In an abbreviated span of time, ambitious reentry went from "off-the-wall" to intelligible to credible to persuasive.

But reentry has been embraced by bipartisan mainstream reformers

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562. For one of the insightful accounts of "off-the-wall as it functions in constitutional debate, see Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) (explaining how social movements help shape the contours of constitutional reasoning, moving claims from being "off the wall" to being central examples of constitutional common sense).

only or at least principally because it embodies, they hope, both cost savings and safety. Any questions (categories, stories, arguments, and the like) reflecting a more frontal attack on targeted mass incarceration and social control are still perceived, at least by those most powerful within the bi-partisan mainstream reformers, as off-the-wall. By contrast, for the past four decades there has been almost nothing anyone could say *in favor* of targeted and severe punishment (of adults and children) that anyone would regard as disqualified as an argument or disqualifying about the speaker.

In 2013, some heavyweight conservative (Bill Bennett, Newt Gingrich, Ed Meese, Paul Ryan) may perhaps have enough special standing to pose serious questions about targeted mass incarceration and social control. But those who work for and are associated with the Reentry Policy Council will only follow and never lead. That may not make them any different from the Supreme Court. But the big point is that avoiding “off-the-wall-ness” about criminal justice reform—about the status quo—is what people have strongly internalized as central to their loyalty oath and remaining “in the game.”

#### **A. Choosing to Operate Comfortably from Within the Reigning Vision of Problem Solving**

It should come as no surprise that the Report proceeds from within—and can be justly regarded as an expression of—the reigning vision of problem solving. What else should we expect of bi-partisan elected and appointed officials and their staffers and their preferred working colleagues? Still making explicit this vision reveals strong preferences—default modes—that influence every aspect of the report, from the formulation of the problem to the policy statements to the particularized recommendations. Further, by contrasting the reigning vision with an available alternative—what I call the rebellious vision, I wish to make plain that another choice could have been made. That is certainly not to say I have any reason to believe this alternative vision of problem-solving practice was ever seriously considered by or even appreciated among idealists working for or in collaboration with the Reentry Policy Council.<sup>563</sup>

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563. My outline sketch of the reigning and rebellious visions—and the relationship between the two—can be further studied in what now has become a substantial literature, across disciplines, if often using different labels. For only some of the exemplary scholarship about lawyering, see, e.g., Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); see also Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL L.J. 687 (1995); Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM.L.J.1 (2007); Bill

In the reigning vision, experts rule. They behave as if they can see panoramically. In framing problems and choices, identifying and implementing worthy strategies, and deciding how much and whose feedback qualifies as necessary for effective monitoring and evaluation, these experts collaborate principally and often exclusively with one another. They issue mandates and formulate policies and distribute protocols and determine strategies. Those on the receiving end of these directives, typically comply. That's how they come to be regarded—and can continue to be respected—as doing their jobs as workers and as citizens and as clients and as patients and on and on.

The reigning vision pervades most systems in which we work and live. If you look closely enough, you can spot this vision deeply embedded in the

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Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246 (2002); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043 (2004); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Lucie White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271 (1990-1991); Lucie E. White, *To Learn and Teach: Lessons from Driefonteinon Lawyering and Power*, 1988 WIS. L. REV. 699; Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999). For still much powerful articulation of a rebellious vision of public defender and indigent criminal defense practice, see CMTY. JUSTICE INST., BRENNAN CTR. FOR JUSTICE, *TAKING PUBLIC DEFENSE TO THE STREETS* (Raising Voices Series, 2001), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_34975.pdf](http://www.brennancenter.org/page/-/d/download_file_34975.pdf); see also Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)). For some early and some later work of my own analyzing how the rebellious vision challenges the reigning vision, see, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); see also Gerald P. López, *Economic Development in the "Murder Capital of the Nation"*, 60 TENN. L. REV. 685 (1993); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004).

Criminal Justice, Public Health, Philanthropic, Finance, and Educational Systems. You can recognize the ideological biases of the reigning vision in Racial, Gender, and the Sexual Orientation Systems that shape and reflect housing and labor and credit markets. Even more broadly, you can identify how the reigning vision shapes relationships with professionals and in everyday encounters.

Through these systems, we learn and teach which people should be and should not be regarded as experts. We learn and teach which people should be and should not be regarded as worthy collaborators. Who gets classified as an expert and as a worthy collaborator can vary some from context to context. And you can find some “exceptions” almost everywhere. That is, in fact, one way the system legitimates itself as open to merit. Still, across contexts, within the reigning approach, we typically pick ahead of time those worth listening to and learning from. In most systems, we pick elites.

That makes total sense, at least in the reigning vision’s account.<sup>564</sup> Some are suited to rule. They are an aristocracy of talent and expertise (“wolves”), who rise to the top through competitive struggle. Unlike most people, they understand the intricacies of interests and issues and can manage the messy, conflict-ridden, and enervating complexities of making big decisions. As a matter of “merit,” those suited to rule should be and indeed are the central actors in work and life, across systems, institutions, organizations, and relationships, rule by elites equips us all to work more effectively and live more securely. Or at least we’re so encouraged to believe.

It is desirable (not condemnable) that the reigning vision does not ask people to do more than they can do. Most people are suited to be ruled. Their role is to benefit from the wisdom of experts and, periodically, to express their views about the performance of those in power (voting at election time, responding to polling calls, selecting lawyers and doctors, and the like). Otherwise they should get out of the way. That limited role for most permits everyone, in the reigning vision’s portrayal, to enjoy the luxuries of a compellingly rational division of labor and allocation of resources.

A vision of problem solving practice and of democracy should most of all protect us through our experts from infringements and threats rather than otherwise express any deeper aspiration we may all have to shape how work and life should be pursued. Equality and participation can be understood as constitutional ideals, but the everyday “truth” of working and living

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564. This passage draws, in particular, on Ascanio Piomelli’s illuminating account of the relationship between democratic theory and lawyering theory; see Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006).

involves smartly limiting the roles of most and ceding authority to experts is just the only way to go. From the perspective of the reigning vision, radical participatory and egalitarian “self-governance” in our relationships and in our governance systems is a Pollyannaish aspiration—mistaken, out-of-reach, utopian. Far worse, it’s a downright dystopian objective: an imaginary place where everything would be as bad as it could possibly be.<sup>565</sup>

It’s not just elites selecting and defending the selection of elites. The systems, institutions, organizations, and professional and everyday relationships imbued with the reigning vision engender remarkably broad allegiance. Loyalties can be detected among those obviously benefitting all the way to those who endure routine subordination. Some proudly defend rule by experts; others prove unable or unwilling openly to confront systems they perceive as too entrenched to alter; others still stomach disrespect they rage about at various moments. I will not pretend to catalogue the ways in which we all can prove capable of accepting and reinforcing what already is. (Fascinating fields of research study these phenomena.<sup>566</sup>) What should be obvious is how often—not always, but often—we settle for what the reigning vision offers as the best possible options for how to work and how to live together.

In mounting a challenge to the reigning vision, the rebellious rival unites key fundamentals in pursuit of radical democracy, where equal citizenship is a concrete everyday reality and not just a vague constitutional promise. In the rebellious vision, everyone collaborates in problem solving, seeking out and sharing knowledge about existing problems, available resources, and useful strategies. Varied problem solvers connect those who face problems with those in public, private, and civic realms who help address them, building networks of valuable know-how among diverse problem solvers and helping shape and meet common goals.

Whenever problems remain unaddressed even after making such connections, problem solvers attempt to fill voids by scavenging around for resources, leveraging what is available with what may never have been tried, and assembling, as needed, one-time troubleshooting squads or more permanent full-fledged partnerships. Committed routinely to monitoring and evaluating strategies, rebellious practitioners aim always to enhance

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565. Though the roots of this derisive view can be traced hundreds of years in the United States and thousands of years in democratic theory, the modern trashers of radical participatory and egalitarian self-governance include, prominently, RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 112 (2003).

566. For a good example of “system justification literature”, a lineage that appears to be directly traceable to Gramsci, compare John T. Jost et al., *Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 586, 593 (2002), with ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971).

problem-solving capacity. Problem solving rebelliously pursued melds street savvy, technical sophistication, and collective ingenuity into a compelling practical force.

Working in this way aims to produce, and depends upon, networks of co-eminent institutions and individuals collaborating with one another. Such collaborators consistently engage and learn from one another, neither bottom-up nor top-down, but every which way at once. They revise, time and again, provisional goals and methods for achieving them; search constantly for how better to realize institutional, network, and individual aspirations; monitor and evaluate, “warts and all,” what’s working and what’s not; use feedback to shine new light upon both future possibilities and current practices.

In this way of working, rebellious problem solvers collaborate as equals. They do so in response to known limitations. Most centrally, they work together as co-eminent practitioners precisely to deal with bounded rationality—with how our limited capacity to store and retrieve information necessarily impinges upon our ability to frame and address problems.<sup>567</sup> And they collaborate as equals in pursuit of articulated aspirations. Most pivotally, they mean through their working relationships—and through the organizations, institutions, and systems in which they labor and sometimes manage—to try to make radically democratic and egalitarian life a real-life experience and not just flashy rhetoric.<sup>568</sup>

Understood and undertaken in this fashion, problem solving does not presume that anyone knows so much or sees so well to make the calls alone about any or all problems. Not the president, not the Black nationalist, not the quantitative analyst, not the Queer activist, not the lawyer, not the incarcerated woman, not the world-famous philosopher. Nor does it presume the effective response to bounded rationality inevitably must

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567. To return to origins of and radical challenges presented by bounded rationality, consult the stunning work of Herbert Simon, along and in collaborations with Allen Newell. See, e.g., ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972); see also HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (4th ed., 1997) (1947).

568. The portrayals are vast and varied, across scholarly and popular literatures, fiction and nonfiction, and for only a tiny sample of what I have found valuable, see JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* (1935); JOHN DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* (1929); FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999); HANNA FENICHEL PITKIN, *THE ATTACK OF THE BLOB: HANNAH ARENDT’S CONCEPT OF THE SOCIAL* (1998); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999); ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987); Warren C. Haggstrom, *For a Democratic Revolution: The Grass-Roots Perspective* in *TACTICS & TECHNIQUES OF COMMUNITY INTERVENTION* 220 (John E. Tropman, John L. Erlich & Jack Rothman eds., 4th ed. 2001); Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167 (1987); Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 343 (Barbara Smith ed., 1983).

translate into mind-numbing routines. Monstrously monotonous assembly lines (the sort often associated with but extending far beyond Henry Ford) need not be how we organize work or life. Together, working as coequal collaborators, we are capable of producing a better world than the one we were born into and encounter so frequently today. And we should.

This way of problem solving aims to support and reinforce—and, now and then, take the lead in demonstrating how we might live together in a fully robust democracy. That goal cannot be achieved easily, much less automatically. That's not the way aspirational political ideas or everyday politics works. Instead, we do what we can. We seize opportunities, small to large. We see just how far we can extend and broaden and deepen our way of working and living. In this fundamental sense, rebellious variations of problem solving and radical democracy do parallel and enrich one another. Trying collectively to secure cooperation in the midst of unavoidable complexity, difference, and vulnerability—a synonym for rebellious vision of working—takes as its point of departure and declares as its goal engaging equals in understanding and enhancing life.

Having described the two visions, the very notion that the Reentry Policy Council would ever seriously contemplate the rebellious vision seems itself off-the-wall. Fair enough. Yet it is crucial to realize that all those involved with the preparation of the Report encountered people and proposals embodying that vision. And they chose actively to ignore or reject its possibilities. They consciously decided not to regard and to include as equals and as equally vital participants in the formulation of their Report a particular set of people, people with direct experience with and strong views about every topic addressed and snubbed in the Report, a set that includes inmates, those living with criminal convictions, their families and kinship networks, those working in community-based organizations, and all those openly opposed to targeted mass incarceration and social control.

Perhaps naming those excluded as equals and as equal participants is to make the case why the Reentry Policy Council would reject the rebellious vision. Why would the Reentry Policy Council include as co-eminent problem-solving practitioners the least qualified and the most incompetent people? Why would anyone in their right mind include them as among those 'in charge' of anything, much less the formulation and execution of comprehensive and ambitious and effective reentry? Including these people in equal numbers and with equal voice in the formulation and execution of the Report would be to turn over an important project to the clinically pathological and the politically crazy ("Inmates running the asylum.").

Most within the bipartisan circles might even be inclined to label this approach to problem-solving practice and democratic life Pollyannaish and

even dystopian.<sup>569</sup> Those networks of bipartisan mainstream reformers within and supporting the Reentry Policy Council regard themselves as duly elected and appointed representatives in the business of protecting the people against bad government. Authorized by periodic vote (and, in modern times, informed by endless polling), they do for the people what the people have no business (or taste for) doing for themselves. To do any less or any differently would be to abdicate responsibility.

There is absolutely nothing to apologize for in embodying this approach to work and life. The reigning vision of problem solving has a distinguished pedigree. In its evident distaste for radicalized and egalitarian problem-solving practice and democratic life, the Reentry Policy Council aligns itself with Federalist Founders, with Joseph Schumpeter, with modern pluralist theorists, and with Judge Richard Posner.<sup>570</sup> That's a first-rate rate crowd of intellectuals to be running with, perhaps nearly ideal for bipartisan mainstream reformers.

Besides, most people in the United States behave as if the reigning vision suits them plenty well. Democracy is an election time responsibility for everyday citizens. Choose who among the competitors shall govern, then observe those elected officials and appointed officials (and all the others they directly collaborate with) engage daily in the deeply conflicted messiness of political problem solving of everyday life.<sup>571</sup> What else could most folks want—at least that they're willing to do?

Still, choosing to operate within the reigning vision begets consequences. And those consequences pervade every aspect of the Report. In everything from the framing of the problem through the policy statements and recommendations to the identification of obstacles, we can detect a form “perceptual segregation”—seeing through selected eyes and certainly not through excluded eyes.<sup>572</sup> In a Report formulating a national

569. Such charges, of course, have been made against the rebellious vision, always through a vulgar distortion of assumptions and aspirations and methods, most often made by those who have proven unwilling to learn despite carefully detailed efforts to explain their misapprehensions and mistakes. For an superb analysis of such misleading literature, evaded and never rebutted by those who have distorted and would again, see Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000) and for an illustration of my own occasional response to intentionally misleading accounts of the rebellious vision, e.g., Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996).

570. For examples of the views of these influential figures, see THE FEDERALIST NO. 10, AT 82 (JAMES MADISON) (Clinton Rossiter ed., 1961). JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 24–25 (2D ED. 2003) RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT (1989) (1948); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 112 (2003).

571. See Piomelli, *supra* note, at 569.

572. For one illuminating analysis of the perceptual differences between insiders and outsiders, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093. (2008).



codification of how best to approach ambitious reentry, the Reentry Council chose to exclude as of equal importance the experiences and insights of those incarcerated, those living with criminal convictions, those in families and kinship networks struggling with daily adjustments and inadequate resources, those in community-based organizations and others militantly opposed to targeted mass incarceration and social control. This decision proves telling.

## B. Framing the Problem

From the vantage point of the Reentry Policy Council, the problem is that states can no longer afford the incarceration costs of the “tough on crime” approach to criminal justice.<sup>573</sup> In search of some means of reducing those costs without sacrificing (and perhaps enhancing) the safety achieved over the past thirty years, elected and appointed officials and all those they collaborate focus on the approximately 97% of those incarcerated who will be released. They do because technical parole and probation violations represent the fastest growing category of admissions to prisons. Improving the rate of successful reentry can generate meaningful savings

Such savings, says the Report, are unavailable through other options. Cutting services within and outside of prisons and jails would render already minimal availability even more threadbare. Cutting correctional staffing would only render threatening environments even more threatening. And, unlike previous years, enhancing “tough on crime measures” which would only lead to larger numbers incarcerated almost all of whom return to the communities.<sup>574</sup>

Off the table, of course, are the two options that obviously would cut costs: Consciously choose to incarcerate far fewer people and deliberately design to decarcerate as many feasible. Doubtlessly both options were indeed far outside the bipartisan consensus. And they represent, I admit, the views of militant opponents rather than avid fans of the current criminal justice system. But, as scholars now have begun to assert, without pursuing both options with decided vigor the chances of decreasing the costs of targeted mass incarceration and social control are dim.<sup>575</sup>

The bias in favor of the current approach to criminal justice runs so

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573. The best thinkers about problem solving stress how, across professional and lay domains, we spend far too little imaginative energy and time experimenting with various ways of “representing” (in today’s rhetoric, framing) a problem and least understand this step in the problem-solving process. See e.g., Herbert Simon et al., *Decision Making and Problem Solving*, Report of the Research Briefing Panel on Decision Making and Problem Solving, in RESEARCH BRIEFINGS 1986 at 29 (1986), available at [http://www.nap.edu/openbook.php?record\\_id=911&page=17](http://www.nap.edu/openbook.php?record_id=911&page=17)

574. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 2–6.

575. Rosemary Gartner, Anthony N. Doob & Franklin E. Zimring, *The Past as Prologue, Decarceration In California Then And Now*, 10 CRIMINOLOGY & PUBLIC POLICY 291 (2011).

deep than it skews not simply how the Reentry Policy Council frames the problem but even how it assesses strategies available for addressing the problem it has formulated. Even on its own terms, the Reentry Policy Council failed frontally to evaluate how even dramatically improved reentry would measure up as a cost-reduction strategy when compared to significantly less incarceration and more decarceration.

Especially the idealist among the Reentry Policy Council might respond, in confidence, that framing the problem in terms of cost-reduction was the only way finally to urge ambitious and effective reentry. In this way of thinking, some among the many working on the Report pulled a fast one. They convinced everyone that reentry can solve a fiscal problem when the real aim all along was to transform reentry programs both within prisons and jails and in the communities to which inmates return. If that's true, then their policy statements and recommendations matter no less and arguably more. The authors were responding to a moral and not just a fiscal crisis.

Yet others on the Reentry Policy Council might all along have appreciated the varied aims of the bipartisan reformers, including the aspirations of the idealists. They cooperated because they wanted their own cover. If reentry were being pitched publicly as a wise response to the fiscal burden of targeted mass incarceration and social control, they might go along with the Report precisely to buy time before again urging, after recovery from the recession, the practical wisdom of utterly tough-on-crime policies. They had their own reasons for taking off the table reduced incarceration and enhanced decarceration and for backing the time-consuming production and wide dissemination of a 632 page Report.

All in the name of cost-saving and safety-enhancing reentry.

### **C. Combining Right People and Data**

The Report emphasizes, from the outset and throughout, the Reentry Policy Council's central message: Combine the right people and the right information and enhanced and effective reentry programs will follow. That message may well be correct. That seemingly banal platitude may turn out to define in the trenches whatever we may define as success. But the Reentry Council's answer to the right people and the right data seems hugely skewed, possibly contradictory, and ultimately misguided. Despite exhorting others across the country to remain open to possibilities, the Report takes a decided view on exactly who should be included and excluded and what data should be pursued and respected and what not.

In practice, what turn out to be Report's answers to these questions? The right people turn out to be existing stakeholders. And by the Reentry Policy Council's own definition, these people and organizations and institutions may have been created through and certainly depend upon the

status quo both for influence and even for livelihoods. Though the Report warns about the bias of favoring large organizations, they define “quality organizations” everyone should seek out as those that demonstrate the capacity to collect data, to comply with performance indicators contractually imposed, to provide effective service delivery systems adhering to existing evidence-based practice.<sup>576</sup> The Report can often feel out of touch, but it’s fairly astonishing to think (in 2005 or in 2013) that the smaller less favored organizations already can demonstrate such evidence-based practice. Even if they agree with this approach, it’s very expensive and still-too-few funders actually provide the dollars to generate the data they may themselves insist on seeing.

But unreality does not stop there in the Report’s exhortation to pull together the right people and the right data. The Reentry Policy Council acknowledges that policy makers may encounter “reluctance” by service providers to be pulled into ambitious reentry collaborations.<sup>577</sup> Though noting that some outfits work in isolation, the Report attributes this reluctance limited budgets and scarce resources.<sup>578</sup> Reluctance? Limited budgets and scarce resources? That feels both too delicate and too familiar, not just for me but for anyone experienced in everyday field work.

The fundamental dilemma we face in asking individuals to work collaboratively and accountably is that far too often they are embedded in overwhelmingly uncollaborative and unaccountable systems.<sup>579</sup> Existing institutions reflect the reigning vision of problem solving, and that vision always has talked wildly more about collaboration and accountability than most operating within it ever intended to make real. Despite evident and important pockets of radicalized democratic practices, individuals can find around them and doubtlessly have internalized at least some of the moves to evade even brilliantly designed exhortations and mandates to collaborate and to be accountable.

To make matters worse, the Report is asking diverse service providers to work, often for the first time, with incarcerated and formerly incarcerated men and women. Especially in these circumstances, instead of describing them as reluctant, why not depict them as perhaps ideologically opposed? Why not declare them perhaps deliberately indifferent to the well-being of these men and women, their families, and their communities? We portray

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576. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 46.

577. *Id.* at 38.

578. *Id.*

579. For how this view served, in part, as the point of departure for an earlier generation’s philosophical pragmatists as well as (to take only one of many examples) contemporary “democratic experimentalists, see *e.g.*, JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (1916); Michael C. Dorf & Charles F. Sabel, *A Constitutions of Democratic Experimentalism*, 98 COLUM L. REV. 267 (1998).

those we incarcerate as monsters and these portrayals stick with service providers as well as they stick with others.

The Report's answer to this challenge (and to most others) is data. What the "right data" means is both vaguely and narrowly defined. The Report routinely and exclusively refers to "hard empirical data" ("criminogenic," "therapeutic," and the like) as the data of choice. In the judgment of the Reentry Policy Council, these data are produced by robust and demanding standard—to be respected, required, followed. Since I routinely consume studies of every sort as an essential aspect of my lawyering, and since I have led research teams that have undertaken large empirical studies producing mountains of valuable quantitative as well as qualitative data, I do not want to be understood as in any way opposed to the promise or payoff of hard empirical data. Such data has helped to shape and evaluate the effectiveness of our problem-solving practices and continues to do so.<sup>580</sup>

But the Reentry Policy Council never usefully describes how all data in every sort of research reflects assumptions, aspirations, methods, interpretations. The Report fails to effectively focus attention on the need not only to gather but to scrutinize data. All data, hard and soft and intermingled. Insisting on the "right data" and repeating robust and demanding standards does not substitute for insisting on a diagnostically discerning eye about all evidence. Worse still, being deeply predisposed to accept—to insist—that "hard data as such" will overcome the challenges of reentry is itself a persistent false belief in the face of strong contradictory evidence.

This apparent delusion directly intersects the Report's bias in favor of evidence-based strategies. What might be the reason the Reentry Policy Council ostentatiously genuflects before the idea of the "right data" and, in the Report, ferociously proselytizes for (a particular brand of) evidence-based strategies?

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580. In most circumstances, these studies and problem solving efforts remain confidential, but for published illustrations of data we gathered and analyzed in working with undocumented Mexican in New York City, particularly around health; see e.g., Arijit Nandi, Sandro Galea, Gerald López, Vijay Nandi, Stacey Strongarone & Danielle C. Ompad, *Access to and Use of Health Services Among Undocumented Mexican Immigrants in a U.S. Urban Area*, 98 AM. J. PUBLIC HEALTH 2011 (2008); Craig Hadley, Sandro Galea, Vijay Nandi, Arijit Nandi, Gerald López, Stacey Strongarone & Danielle Ompad, *Hunger and Health Among Undocumented Mexican Migrants in a U.S. Urban Area*, 11 PUBLIC HEALTH NUTR. 151 (2008). See e.g., Gerald P. Lopez, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. Rev. 59 (2004); Gerald P. López, *The Health of Undocumented Mexicans in New York City*, (FORTHCOMING UCLA CHICANO/LATINO REVIEW 2013). For a published illustration of data we gathered and analyzed in working with Asian Pacific Islanders and reentry challenges, Michelle Tseching Fei & Gerald P. López, *Learning How Regularly to Improve Our Capacity to Meet the Challenges of Asian and Pacific Islander Reentry*, 31 AMERASIA JOURNAL 61 (2005).

#### D. Insisting on Evidence-Based Strategies

Here is my answer, my hypothesis: In stressing evidence-based strategies to achieve cost-reducing and safety-enhancing reentry, the Reentry Council aims to lend its approach the reassuring (and hierarchically valued) feel of "science." Nothing is inherently wrong or ill about the Report's narrow brand of evidence-based strategies any more than anything is inherently wrong or ill about science. But the Reentry Policy Council aims to associate itself with, to be categorized within, science in order to benefit from the mythology of technocratic problem solving. How better to justify the rule of experts?

If this hypothesis strikes you as curious, certainly those in law should appreciate the power of "hard methods and data." Some strands of the modern law and economics movement and even some claims made about legal reasoning have aimed to legitimate themselves as superior analysis precisely by invoking scientific status. The trouble with the Report's scientific pretensions is not so much that they are inane as the fact that they can be so effective. Witness the standing of law and economics within the legal academy and the especially exalted status still often accorded legal reasoning.

"Hard methods and data" should not be unfairly or cheaply belittled, nor should they be thrown out as worthless. But especially when a crowd with the conventional power of the Reentry Policy Council aims to extend its influence by pretending to be doing what it is not, then it is line-drawing time. Even the most illuminating "evidenced-based strategies" are subject to questions and doubts. And most of what the Report counts as quality evidence-based work can be, on close analysis, stripped of the self-importance the Reentry Policy Council would like to give these programs, strategies, interventions and themselves. To root an entire approach to comprehensive reentry in such a bias justifies neither confidence nor acclaim.

If anything, matters only get worse when closely inspecting the text of the Report. Of the many exhortations in favor of evidence-based programs, interventions, treatments, and decisions in the 632 pages, here is perhaps the most revealing, quoted in full with my italicized emphasis:

The definition of an evidence-based program differs depending on the field. For example, Dr. Robert Drake, a national leader in the movement towards evidence-based practices, defines evidence-based programs in the mental health field as standardized treatments and services which are subjected to controlled research and involve both objective outcome measures and more than one research group. The National Institute of Corrections, on the other hand, defines evidence-

based programs as interventions that reduce offender risk and subsequent recidivism and, therefore, make a positive long-term contribution to public safety. Regardless of the field in which they are applied, evidence-based programs are built on rigorous demonstration of program effectiveness. While evidence-based programs are supported by certain values and assumptions, they are not themselves values; rather, programs built on an evidence base are specific interventions and treatment models that have been shown to improve outcomes for both the client and the system.<sup>581</sup>

Can it be that the Reentry Policy Council actually believes what it writes? Does calling a program “rigorous” mean that it has escaped the decisions of what to measure and how to measure it? And how to interpret the data produced? Does it mean the decisions do not entail choices? Of certain assumptions and not others, of some goals and not others still, of some methods and still not others? And those choices themselves reflect contestable possibilities. And embody everything from political ideology, to spiritual faith, to personal preference, to mindlessness flows into and gets reproduced in the process.

It’s not at all my view that we can escape such choices or what they represent. To the contrary, my point (about biases, about much else) is that we should openly acknowledge our choices, explicitly articulate our explanations, and search for (rather than evade) evidence that may teach us we are wrong. We should anticipate even unfathomable surprises. To insist, as the Report does, that value-supported evidence-based programs are “are not themselves values” as if that claim proves anything about “neutrality” or “science” or “escaping choices” is weird. Or to circle back to a definition that evidence-based programs are those “shown to improve outcomes for both the client and the system” as if that somehow magically erases value-pregnant choices is absurd.

It does not reduce skepticism that the citation at the end of the final sentence, the one I’ve italicized, is to *Criminal Justice/Mental Health Consensus Project* (New York, NY: 2002), another publication of the Council of State Governments. That the authors of the Report endorse what the CSG says has already been amply demonstrated. That the Report does not hold itself open to how feedback might transform its baseline convictions offers a perplexing depiction of an evidence-based system.

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581. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 54.

## E. Requiring Cost-Benefit Analysis

A report wishing to be understood as requiring—and itself reflecting—scientifically-based problem solving (technocracy) must perhaps unequivocally endorse cost-benefit analyses. Having evolved from a tool to illuminate government decisions about whether or not to build dams and highways into a ubiquitous method employed to forecast and measure the efficiency of rules and seemingly all else, cost-benefit analysis has become intimately linked with the proudly vigorous practice of technocrats.<sup>582</sup> Not to require cost-benefit analysis as pivotal to any comprehensive approach to reentry would be tantamount to abandoning in advance the very effect the Report aimed to most to achieve.

The deep predisposition in favor of ‘hard methods and data’—emulating the time-tested and the newly endorsed—can be discerned in the Report’s straight-ahead treatment of the necessity for and payoff of cost-benefit analysis. As part of both process and impact evaluations, the Report requires a cost-benefit analysis to quantify whether a program is operating efficiently.<sup>583</sup> Do a program’s benefits outweigh its costs? Especially in a recessionary period and a fiscally conservative environment, cost-benefit studies must ensure efficient allocation and expenditure of funds. Because such studies are expensive and typically beyond the means of many local community-based organizations and agencies, the Report emphasizes the necessity of developing relationships with cost-benefit analysts employed by government and colleges and universities.<sup>584</sup>

But cost-benefit analysis faces serious critics. Consider only two clusters. To formulate and manage reentry in terms of cost-benefit analysis requires converting concrete human circumstances (of often harsh and painful realities) into abstracted technical categories. The bloody turned bloodless, the priceless monetized, the sacred commodified.<sup>585</sup> In the

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582. For extensive and insightful discussion of cost-benefit analysis in government decision making and beyond, mainly from the perspective of mainstream scholars who produce and support such hard methods and data see *generally*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008); MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006); and ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS* (3d ed. 2006). The modern origins in the United States of cost-benefit analysis can be traced back to early technocratic efforts (economists, engineers, and the like) to devise methods for how best decide whether or not to build dams, highways systems, and the like; see e.g., ROLAND N. MCKEAN, *EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS, WITH EMPHASIS ON WATER RESOURCE DEVELOPMENT* (1958); E. J. MISHAN, *ECONOMICS FOR SOCIAL DECISION: ELEMENTS OF COST-BENEFIT ANALYSIS* (1973).

583. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 93.

584. *Id.* at 93

585. For only a sample of significant literature, scholarly and popular, see e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996); ROBERT KUTNER, *EVERYTHING FOR SALE: THE VIRTUES*

process of the conversion of human experience into abstruse jargon, cost-benefit analysis tends to obscure political and moral choices unavoidably involved in such methods.<sup>586</sup> Particularly in a scientific method, why bury from view exactly the noneconomic decisions involved in choosing what to measure, what proxies to employ, and how to weight? Finally, should even an entirely transparent and superbly executed cost-benefit analysis serve as *the* measure of reentry programs, interventions, and decisions?

The Report never mentions these objections, much less explores them. Indeed the sure-footed treatment of cost-benefit suggests a deep confidence. The Report believes in cost-benefit analysis and in its centrality to transformed reentry. The Report demands, too, everyone else understand the conviction they too must develop (or at least perform as if they too believe). Without such analysis, of both process and impact, policymakers and service providers cannot ensure a program is operating efficiently. Only sophisticatedly powerful analysts can determine and ensure efficient allocation and expenditure of funds. The high price of such studies will itself be wildly outweighed by benefits they provide everyone involved in transforming reentry. Who could possibly oppose making ourselves face whether benefits outweigh costs?

It is possible that cost-benefit analysis has become so commonplace, so much the default, that the Reentry Policy Council would never have thought twice about unequivocally building its approach around such tried-and-true science-based methods and goals. Besides, beginning in the Reagan Administration and stretching forward through 2013, the federal government began to demand cost-benefit analysis of federal regulatory regimes, including those implicating state and local governments.<sup>587</sup> In this environment, with common sense and government advances reinforcing one another, *not* to require cost-benefit analysis would be for the Reentry Policy Council to acquiesce further in the less-than-robust approach to reentry the Report means to displace. And when the problem as framed is cost-

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AND LIMITS OF MARKETS (1997); MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

586. For a compelling articulation of the indeterminacy of cost-benefit analysis, particularly as formulated by many modern economists, including many of the early founders of law and economics and many other liberal law and economic thinkers, see Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). For related critiques from this era, focusing more exclusively on law and economics scholars, see C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 Phil. & Pub. Aff. 3 (1975); Morton Horwitz *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Mario Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980).

587. Across the Reagan, Bush, Clinton, Bush, and Obama administrations, cost-benefit analysis became far more prominent, perhaps embodied by best by the increased insistence by the Office of Management and Budget to require such reports about all federal regulations. See e.g., Office of Management and Budget Report to Congress on the Costs and Benefits of Federal Regulation (2002)



reduction, how can anyone imagine getting to that goal without routinely implemented cost-benefit analysis. Policymakers must know “what works” in allocating and spending reentry funds.

But the Report’s faith in cost-benefit analysis, like its proselytizing for evidence-based programs, betrays a lack of intellectually curiosity and sophistication. It’s not just that there is no mention in 632 pages of the important critics concerned with everything from heterodox lives being converted into uniform units of measurement to political choices buried beneath the technocratic jargon. There is no mention, either, that critics include prominent economists who value the contributions of high-quality cost-benefit analysis and who can be justly regarded as among the most influential in teaching such methodology. These economists stress the limits of cost-benefit analysis (and of economic analysis), the openness with which it should be undertaken and reported, and the inevitable moral and ideological choices made in generating and interpreting cost-benefit data.<sup>588</sup>

Why wouldn’t the Report acknowledge and deal with these highly regarded and influential views about how cost-benefit analysis ought to work and the role it out to play in political decisions? Why not adopt explicitly in the Report an attitude toward the use of this method in its comprehensive approach to reentry? Cost-benefit analysis becomes more (and not less) important when undertaken openly, ambitiously, aware of what the best international economists’ advise about its role and its value. Why not subject the methods of cost-benefit analysis to the same intensive scrutiny that, ostensibly, cost-benefit analysis imposes upon every reentry decision, intervention, and program? Why not openly evaluate the very means of evaluation, in just the way many cost-benefit advocates regard as pivotal to improving the quality and payoff of such a methodology?<sup>589</sup>

## **F. Dodging Graphic Details of Incarcerated Life and Life in Targeted Communities**

Many might think the Report is too long. Indeed, many might regard my summary as too long. I hear complaints about the length of documents

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588. Among those economists who aim both to improve cost-benefit analysis and limit its role, we can count Edward J. Mishan, the original author and now co-author of perhaps the most influential guide for sophisticated cost benefit practitioners, see EDWARD J. MISHAN & EUSTON QUAH, *COST BENEFIT ANALYSIS* (Routledge 5th ed. 2007) (1976). For only a sample of the preeminent economists who have voiced such views, see Kenneth Arrow, et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?* 272 *SCIENCE* 221 (1996); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 150 *U. PENN. L. REV.* 1489 (2002).

589. For a sober and revealing assessment of the quality of these analyses conducted in the Reagan, Bush, and Clinton administrations, by an advocate of cost-benefit analysis, see Robert W. Hahn & Patrick M. Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, 1 *REV. ENVTL. ECON. & POL’Y* 192, 192 (2007).

all the time—about fifty page documents, even twenty page documents, much less a 632-page document. A terrifically able and experienced editor could shorten the Report, perhaps considerably, without losing conceptual sophistication or illustrative detail. So shortened, the Report might feel less imposing for many and acceptably lengthy for those whose job it is to read such documents (for those who, experience tells me, all too frequently skim reports and perform as if they have read them carefully).

Or perhaps we should all accept that most people, even those who get paid to study reports and articles and books, will not read even a freshly edited Report. What we should expect (and what perhaps certainly appears to have become the norm in private, public, and civil circles) is that everyone will skim the “executive summary.” If that’s true, the Report Preview plenty ably fills that role. Still, only some will read that document. Others will continue to act as if they have read the entire Report, through a modestly clever set of maneuvers. Still others will unabashedly proclaim that they have read nothing and see absolutely no reason why they cannot still ask as many questions as they please, and offer anything on their mind as penetrating insights. Perhaps the Reentry Policy Council knows all this, perhaps helping to explain a 632-page Report.

But length is not my issue. Or if it were, the concern runs in the other direction. After painstakingly reading and studying—many times over—these 632 pages, I want to know where the other pages are. Truly, I do. Where are the pages filled with probing depictions—mind-numbing schedules, everyday fears, routine risks—of all the people locked up and living with criminal convictions? Where are the pages identifying—yes, in vivid detail—all the hideous atrocities of prisons and jails? And the banally brutal revocation decisions made by parole and probation officials? Where are the pages bringing to life all the neighborhoods where disproportionate numbers of inmates—low-income, of color, and immigrant communities—come from and typically return?

And where are the graphic explanations of how, in these neighborhoods, disparately frequent stops lead to seizures, frisks, arrests, prosecutions, pleas, to doing time for stretches too stupefyingly long to regard as sensible unless you’re a penal zealot without a trace of fiscal accountability? Where are all those communities whose daily lives remain beyond the experience or even the imagination of most Supreme Court justices, most prosecutors, most who lead correctional departments, most who serve as Mayors and Chiefs of Police? Beyond the experiences and imaginations, not because these various officials haven’t ever engaged in illegal activities themselves, but because they rarely, if ever, get scrutinized, much less routinely stopped and frisked, arrested, prosecuted, and incarcerated. These live in neighborhoods and communities—and operate within circles—Mayor Bloomberg just “knows” are all law abiding.

Where in the Report are all of the thoroughly slipshod government agencies and community-based organizations, all of which claim to be doing ambitious and effective reentry work and that get rewarded year after year with sizeable governmental and foundation grants, including those awarded by CSG? Those agencies and organizations that do not even accurately describe on their websites or materials what they do and do not do? Those agencies and organizations that dismiss routine evaluations of their services (through robustly researched, designed, and tested survey instruments and the like) as inconceivable or impracticable by those incarcerated, by those living with criminal convictions, by their friends, families, and kinship networks?

Where are all the elected and appointed local, state, and federal officials—and their staffers, consultants, and collaborators—who for decades have ardently supported tough-on-crime programs? Who by now instinctively think and act in terms of—and act to further legitimate—targeted mass incarceration and social control? Who almost never question and almost always routinely implement the micro-practices that, at the ground level, put into action this approach to criminal justice? The same officials, staffers, consultants, and collaborators who mainly lie low these days, hoping the economy will soon rebound enough to permit targeted mass incarceration and social control once again to grow?

Where are those elected and appointed local, state, and federal officials—and their staffers, consultants, and collaborators—who now and then have nullified particulars and dimensions of tough-on-crime programs through their decisions? Who refuse unequivocally to acquiesce in targeted mass incarceration and social control, intermingling rebellion with obedience? Who hope secretly to fight off and delegitimize a criminal justice system they cannot abide even as their jobs require them to execute orders in its name? Where are the direct and often militant challenges to targeted mass incarceration and social control, authored by everyday people, and notable law enforcement, correctional, judicial personnel, and prominent public intellectuals?

Are all the pages I'm yearning for in another book issued by the Reentry Policy Council? In several other books? Are they meant to be read together with the Report? Did someone forget to tell us? And if all this is meant to be in one and the same report, then, by all means, these 632 pages are way too short, not way too long. If CSG and the Reentry Policy Council insist they need all 632 pages to describe and prescribe what readers can now find in this Report, then they need at least as many pages (and likely more) to describe everything they so assiduously omit and downplay and cover. That 1,200-plus-page document—complete with explicit biases, evocative themes, and grippingly accurate details—should be strongly recommended reading for everyone. And that enhanced

document should be mandatory reading for everyone claiming to be a “stakeholder” in reentry, corrections, the criminal justice system, and in all the systems (foster, child welfare, immigration, and the like) that intersect criminal justice.

But simply making this 1,200-plus-page-document mandatory reading cannot be enough, can it? At least not if we are to begin holding people accountable, even now, for how targeted mass incarceration and social control works. After reading this enhanced report, shouldn’t everyone be required to take a set of well-designed and well-implemented oral or written tests? Tests robustly designed to measure that anyone claiming stakeholder status actually knows what has been going on since the late 1970s? All of which has now become so fiscally pricey and criminologically dubious that some on the right have prominently legitimated (made “on-the-wall”) ideas that the great majority of bi-partisan mainstream reformers still treat as beyond what they can say and perhaps even think? Isn’t testing that requires working knowledge of the 1200-plus-page document the least we can do to make certain CSG and all others working with them feel some ongoing obligation to reconsider what they regard as “off-the-wall” in their approach to comprehensive reentry?

But length is not my issue. And my yearning for more pages – in the same report or in other books—should absolutely not be understood as my belief that, if the Reentry Policy Council would only more deeply and thoroughly “humanize” their report, then all would be well. If “humanize” means to make humane, kind, or gentle, then that aim lies near the opposite of what I am insisting upon. Indeed, through various techniques, the Report already makes living in prisons and jails and living on the “outside” with a criminal conviction far more civilized than it almost ever is. My desire for the graphic details the Report dodges—about systems, institutions, agencies, organizations, communities, neighborhoods, individuals—is a longing for particularized categories, stories, and arguments that can help expose the ideological predispositions embedded in the current Report. My yearning is for exactly what would help challenge the empirical and normative convictions so seamlessly hidden or woven into the codification of policy statements, recommendations, and the comprehensive system.

What the Reentry Policy Council dodges absolutely tilts what it declares as truth. When the Report states decisively, “understand who is being released from prison,” it lists factors such as demographics, criminal histories, medical health, substance abuse, housing needs, and level of employability.<sup>590</sup> The impression is of building a “360 view,” gathering with curiosity and energy all the relevant details within all the relevant categories. But I find myself flabbergasted about what never gets noted,

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590. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 26–27.

much less discussed in depth. I want to know, right at or near the top, where has this man or woman been incarcerated? Under what conditions and for how long? What was the medical care like? Did he or she work—for pay or not?<sup>591</sup> What were the prison guards like? And the discharge planners? And what were race relations like? Within the incarcerated population? Within the larger population of correctional employees and inmates? And much more.

Of the many possible pathological possibilities routinely ascribed by the Reentry Policy Council to inmates, the Report studiously evades the those attributable to prisons and jails themselves. To particular penal systems, to particular prisons and jails, to particular regulations and practices, to particular individuals employed by corrections to impose distinctive order on inmates. In any modestly ambitious appreciation of “understanding who is being released,” anyone with any savvy would want ask where did he or she do time? For how long? Ever locked down? In the hole? You learn that much as a young kid growing up in East L.A., East Harlem, and East St. Louis. Can it be true that elected and appointed officials—and their expert staff and collaborators—do not know how to ask these questions?

And if we were to guess about deeply dysfunctional and damaging attributes potentially to be found in a man or woman being released, would we ever imagine not asking and examining closely the consequences of incarceration itself? It’s as if the Reentry Policy Council never had seen the inside of prisons or jails. Never had taken a close look at medical wards and solitary confinement. Perhaps never even had read any prison journals or epidemiological reports about torture. It’s as if the Reentry Policy Council has never known directly about health conditions like those condemned as unconstitutional in California. And if they had not known directly, then they never took the time to read and absorb any of the lengthy judicial opinions about those conditions—opinions written after lengthy trials, after thorough investigations by Special Masters, after detailed briefing not just by plaintiffs and defendants but by numerous ideologically diverse amici, after careful consideration by individual judges and panels of judges, after review by the Supreme Court?<sup>592</sup>

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591. For those who have not studied or thought through the question of prison labor, the place to find powerful questions and penetrating analysis is Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008).

592. For only some of what should be required reading among the opinions and reports in the cases holding California prison’s medical care and overcrowding unconstitutional, see e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). And most court documents before and after the Supreme Court decision can be found at Civil Rights Litigation Clearinghouse, including those related to overcrowding and health conditions at *Plata v. Brown/Coleman v. Brown* Three-Judge Court Proceedings, <http://www.clearinghouse.net/detail.php?id=12280>; *Plata v. Brown*, 01-cv-

But that's not all the Reentry Policy Council dodges. When talking about identifying "where released prisoners are returning" and understanding "the characteristics and service capacities of those communities, the Report creates the impression that many (including those within and collaborating with CSG) have gotten their hands dirty developing just such information."<sup>593</sup> The Report speaks of the frequency with which state prisoners return to only a small number of communities, and even within certain cities within states (Baltimore, for example) to a very small number of neighborhoods. The Report encourages the use of sophisticated mapping software (Geographic Information Systems (GIS)), complete with common-sense directions about the promise and limits of such mapping.

The Report speaks of identifying "mismatches" between the needs of the reentry population and the availability and location of providers offering such services. And to develop comprehensive data banks, the Report encourages the use of "public resources (such as United Way's "First Call for Help" database or the yellow pages)" and contacting the state corrections agency or partner agencies for lists of commonly used services.<sup>594</sup> Particularly to develop a "service directory as a resource for returning prisoners," the Report speaks about gathering information about program goals, target population, client eligibility, services offered, fees, and programmatic capacity for each available service.<sup>595</sup>

From this confident presentation, the Report would appear to grasp the importance of highly detailed information about the local—from the concentration of those living with criminal convictions in certain cities and neighborhoods to the presence of diverse service providers to the geographic proximity of those services most needed by all those facing the challenges of reentry. Exhorting others to gather, assemble, and make readily available such information is, still today, ambitious and pivotal. Indeed, every item identified by the Report has been part of a larger slate of demands made by militant opponents of targeted mass incarceration and social control who always aimed toward credibly effective reentry as part of dismantling the current criminal justice system. The absence of high quality local information about community-based service providers can be described—has actually been described by everyone from Martin Horn to Eddie Ellis—as among the principal reasons highly regarded pilot reentry

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01351 (N.D. Cal. Apr. 23, 1990), *available at* <http://www.clearinghouse.net/detail.php?id=589>; *Coleman v. Brown*, 90-cv-00520 (E.D. Cal. June 6, 1994), *available at* <http://www.clearinghouse.net/detail.php?id=573>. Other reports can found at <http://www.CALRealignment.org/>.

593. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 30.

594. *Id.* at 32.

595. *Id.*

programs failed.<sup>596</sup>

What the Report fails to concede, however, is that that not many jurisdictions in the entire country had, as of 2005, carried out such highly specified mapping, much less developed credibly comprehensive and routinely updated directories to reentry services. What the Report further fails to acknowledge is that almost certainly very few on the Reentry Policy Council had ever undertaken such a job themselves, large in scope and demanding in detail. Indeed, the Report's endorsement of the importance of such localized information marks a decisive break from what had been, among most government officials and diverse funders, a routine indifference to the pivotal nature of knowing the local. So little had most within CSG circles thought about reentry, so little perhaps had they cared about reentry before they began to consider it as a cost-reduction strategy, that they often scoffed at the very notion that ambitious gathering and assembling of neighborhood-level information could possibly prove essential to reentry success.

These are strong claims, I realize. But they reflect direct personal experience and the experiences of others I know well. During the very same years the Report was being researched, developed, and finalized, I lived in New York City and served as the Director of the Center for Community Problem Solving (the Center). The Center worked directly with residents of those low income, of color, and immigrant New York City neighborhoods particularly targeted by mass incarceration and social control policies. In our efforts to "map" those neighborhoods through what we named our Neighborhood Legal Needs and Resources Project, and in our efforts to work with those incarcerated and those living with criminal convictions, we sought funding from state and local correctional officials,

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596. For perhaps the most prominent example, see the description of and discussions about Vera Institute's Project Greenlight, at the Queensborough Correctional Facility in Queens, New York, in such work as Benner Brown, & Robin Campbell, *Smoothing the Path from Prison to Home: A Roundtable Discussion on the Lessons of Project Greenlight* Vera Institute of Justice, (2005), available at <http://www.vera.org/pubs/smoothing-path-prison-home-evaluation-project-greenlight-transitional-services-demonstration-1>. (particularly noting the comments of Martin Horn (Commissioner, New York City Department of Corrections) and Eddie Ellis (Chair, NuLeadership Policy Group, Medgar Evers College, City University of New York); Benner Brown, Robin Campbell, James A. Wilson, Yury Cheryachukin, & Robert C. Davis, *Smoothing the Path from Prison to Home*, Vera Institute of Justice (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/213714.pdf>. For a sample of still continuing scholarly commentary, see e.g., James A. Wilson & Robert C. Davis, *Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program*, 5 CRIMINOLOGY & PUBLIC POLICY 303, (2006). See also Douglas B. Marlowe, *When "What Works" Never Did: Dodging the "Scarlet M" In Correctional Rehabilitation*, 5 CRIMINOLOGY & PUBLIC POLICY 339 (2006); James A. Wilson & Christine Zozula, *Risk Recidivism, and (Re)habilitation: Another Look at Project Greenlight*, 92 THE PRISON JOURNAL 203 (2012).

including some involved with the Report.<sup>597</sup>

Even through well-connected New Yorkers, and despite repeated efforts, we could rarely get any official to meet with us. Those who did often looked at us uncomprehendingly as we described our local mapping project and, among other things, our effort to write and widely disseminate a directory of reentry services. Those few displaying any interest in seeing what we could produce would pointedly emphasize that there was absolutely no money in either state or local correctional budgets for such projects. Our insistence that reentry could never consistently succeed without intensely detailed and routinely updated local information (including “Zagat-like” consumer reviews of all services provided) got us absolutely nowhere with these officials.

In several meetings that became infamous within our Center and those with whom we collaborated, several funders differentiated, in absolute terms, the “policy work” they were interested in supporting and the “community work” we were doing. When we pressed about this dichotomous way of thinking and doing, they appeared dumbfounded. The very idea that “community work” and “policy work” could be intimately related—should always inform one another be for either to be effective—struck the funders as unintelligible. We offered example after example, across diverse areas of work (criminal justice (including reentry), delivery of health services, economic development, financial literacy campaigns, and more and more). They would only repeat their regret that we could not comprehend how they and others did policy work and the high-level policy they produced. In one important sense, obviously, they were right.

We persevered. With the extraordinary voluntary contributions of many (neighborhood residents, clergy, cultural anthropologists, community organizers, epidemiologists, graphic designers), we published THE CENTER FOR COMMUNITY PROBLEM SOLVING REENTRY GUIDE—FIRST NEW YORK EDITION in 2005, the same year the Report was released.<sup>598</sup> With the aid of librarians, we distributed the REENTRY GUIDE to those incarcerated in prisons up and down the state. Through individual correctional officials,

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597. For an account of the vision of rebellious practice that shaped the Center’s work, especially the Neighborhood Legal Needs & Resources Project and others products still, see Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004).

598. See Gerald P. López, *The Center for Community Problem Solving Reentry Guide: a Handbook for People Coming Out of Jails and Prisons and for Their Families and Communities*, New York, N.Y.: The Center for Community Problem Solving Press (2005). For other illustrations of the Center’s published community guides, see e.g., Gerald P. López, *The Center for Community Problem Solving Guide to a Fair & Just Workplace*, New York, N.Y.: The Center for Community Problem Solving Press (2006); Gerald P. López, *Streetwise About Money—The Center for Community Problem Solving’s Financial Educational Guide to Budgeting, Banking, and Credit*, New York, N.Y.: The Center for Community Problem Solving Press (2006).



we conducted live reentry workshops in those same prisons. And with the support of Martin Horn and especially Kathleen Coughlin, we offered a full day's reentry training for Riker's correctional officers and senior staff, focusing on how the Reentry Guide could help inmates and discharge planners prepare and deal with the challenges of reentry.

We did this all for no compensation from New York state or New York City officials. We did this all without any discernible interest, much less support, from various individuals working or collaborating with CSG. Through various intermediaries, we tried, time and again, to secure funding for new editions of the Reentry Guide, for live prison and jail and neighborhood workshops, for routinely updating and sharing neighborhood-level information. Perhaps our openly resolute opposition to targeted mass incarceration and social control doomed all such efforts, certainly many speaking off-the-record told us as much. In any event, we failed, with all government funders, including officials working for and collaborating with CSG.

Perhaps, then, you can imagine the befuddlement and disbelief among those working at and with the Center upon first reading the Reentry Policy Council Report. How could the very same people dismissive of and unmoved by our approach to reentry and, more generally, problem solving now proclaim themselves the leaders in connecting neighborhood-level information to a comprehensive approach to transforming reentry? How could those who could not fathom how local information and policy work must shape one another now present themselves—and be regarded by others—as mobilizers of a new correctional reentry movement?<sup>599</sup> The Reports's emphatic exhortation about the importance of localized mapping and reentry directories for cities and neighborhoods with disproportionate numbers facing reentry seemed more like an attempt on paper to get out ahead of critics without any grounded experience or perhaps even interest in what everyday people know.

Even accepting at face value the Report's enthusiasm for learning in detail about those neighborhoods and communities most affected by incarceration and reentry, the emphasis is again familiarly myopic. In posing and answering the question, "*What are the neighborhood characteristics in areas with high concentrations of releases?*," the Report speaks of "neighborhood indicators," representing both basic demographics and the welfare of the community.<sup>600</sup> Those indicators include, in the Reentry Policy Council's view, housing tenure, percentage of female-headed households, vacant housing, education attainment, marital status, fertility, infant mortality, place of birth, language, and ancestry—those

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599. See Rhine & Thompson, *supra* note 48.

600. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 33.

variables that “can aid in developing a measure of social capital, which will help determine the extent to which communities are equipped to address the challenges that prisoner reentry raise.”<sup>601</sup>

The impression, again, is of a Report unreservedly recommending building a “360 view” of those neighborhoods and communities to which most return after being released from incarceration. But how can anyone claim plausibly to be constructing a candid appraisal about the resources and risks presented by these neighborhoods and categorically exclude just how much the criminal justice system—in particular, law enforcement—targets these communities for special surveillance? We cannot know anything like what we need to know about the chances of those living with a criminal conviction “making it” unless we know exactly what sort of “special attention” law enforcement (and others) give that neighborhood. That’s as true of Baltimore’s communities as it is Mayor Bloomberg’s New York. It is inconceivable that at least some among the many contributing to the Report did not comprehend this basic truth. Yet the Reentry Policy Council chose entirely to omit this “neighborhood indicator,” and the ideological bias could hardly be more flagrant.

Of the many predictors of recidivism, can there be many more salient than the relative “stop and frisk” practices of local law enforcement? I say that not as a matter of demonstrated social science, though certainly as the grounded empirical view of a criminal defense and civil rights lawyer. And I say that at least as much as someone who grew up in a neighborhood targeted and devastated decades before the advent of the late 1970s “tough-on-crime” movement. If anyone still doubts the direct relationship between such “stop and frisk” practices and seizures, arrests, prosecutions, and incarceration, then let’s insist again on mandatory readings and mandatory oral and written tests. There’s a mountain of literature, popular and scholarly, nonfiction and fiction. There are movies and television shows that, in various ways, get all this exactly right. But why not begin with a document offering precisely those graphic details the Report meticulously avoids in its ostensibly “360 view” of neighborhoods facing disproportionate reentry challenges, a report in the form of a judicial opinion written by Judge Shira Scheindlin—yes, the very one Mayor Bloomberg so despises.<sup>602</sup>

If a comprehensive report aims candidly to dig for and make visible the dysfunctions of neighborhoods and of those living with criminal convictions, then it cannot exclude the pathologies imposed by and embodied in the criminal justice system itself, particularly in the practices

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601. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 33.

602. See her 198-page opinion and her thirty-nine page order in *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013), see *supra* note 12, <http://www.nytimes.com/interactive/2013/08/12/nyregion/stop-and-frisk-decision.html>.

and views of local law enforcement.<sup>603</sup> The fact the Report does exactly that comes with the loss of still more integrity for the Reentry Policy Council in proposing as persuasive its comprehensive system of reentry. How can any account that utterly avoids the role of incarceration and law enforcement in creating systemic problems be regarded as a reliable guide, much less as possessing transformative power about reentry?

What today we see all around us are the effects of targeted mass incarceration and social control. By that I mean the criminal justice system that has reigned for forty years largely produced what we see in incarcerated men and women, in those living with criminal convictions, and in those neighborhoods and communities regarded presumptively as law breaking. But, with the same conviction, I mean to declare that the reigning criminal justice system has largely produced what we see in all those who are have never been locked up for their illegal acts, who do not live with the stigma of criminal convictions, and whose neighborhoods and communities remain virtually immune from the targeted profiling of law enforcement, prosecutors and judges, and the correctional industry.

*All* we see in the criminal justice realities within and around our lives in the United States are not brute facts without origins. They reflect the conscious choices of many, including CSG and its collaborators. The overlapping ideologies and on-the-ground electoral politics of bipartisan mainstream elected and appointed officials helped to produce—hugely helped to yield—the very embedded circumstances and opinions we must now transform.

### **G. Espousing Absolutely One Utopian Vision While Nodding Now and Then Toward Another**

Scattered here and there in the Report are riffs and allusions that would appear to cohere around a certain discernible utopian vision. In this vision, the Reentry Policy Council warns policymakers and practitioners against waiting for perfect circumstances.<sup>604</sup> Certainly to get started, and often to

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603. The case law and the literatures available for report authors to read are both wide and deep, but for superb recent scholarly investigation and analysis by Joanna Schwartz and Ingrid Eagly of local law enforcement practices, including the relationship of the criminal justice and immigration systems and the protection (and indemnification) afforded by local governments of those who behave unconstitutionally and abusively, see e.g., Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. (forthcoming 2014); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO LAW REVIEW 841 (2012); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 N.W.L. REV. 1281 (2010).

604. Prominently featured, in Chapter A Getting Started, are ways of moving no matter the

keep moving, scavenge around for resources, leveraging what you may already have and what you can discover among others. Pull together people and organizations, perhaps unfamiliar with any collaboration, much less this particular one. Rope in even those inexperienced in working with the reentry population, with their particular challenges, with their lack of conventional clout and connections. Try out what together you can manage to pull together, not always confident what you put into action will immediately work, perhaps even knowing it may backfire in the short run.

To connect these riffs and allusions in such a fashion gains some support from the Report's insistence that collaborative teams create feedback loops.<sup>605</sup> Employ only evidence-based programs and make decisions about past performance and future adjustments only after cost-benefit analysis. Especially in early iterations, breakdowns and failures will occur. But across the United States, in varied environments, reentry policymakers and practitioners will be beginning to build people and knowhow. They will be on their way, through localized trial and error. Over time, this combination will yield a greater number of successes. The Report's ideal rather distantly resembles the democratic experimentalism championed by many modern thinkers, if admittedly it's a strain wholeheartedly inclined to wrap itself within the aura of science, with experts ruling top-down.<sup>606</sup>

But these riffs, allusions, and feedback loops mislead, I think. Through and through, the Report seems the product of an opposing utopian vision. In this vision, the Reentry Policy Council offers the ideal form of institutional and social arrangement to define and address cost-saving reentry—ideal in the strongest sense of *once and for all* putting an end to the recidivism that haunts the criminal justice system. In this utopian vision, the Report's policy statements collectively entail the plan for the safe and successful transition of a person from prison or jail to the community. Each community must make local circumstances (institutions and individuals) fit within this plan. But the payoff is huge. If the policy statements and recommendations are effectively implemented (through evidence-based programs evaluated through cost-benefit analysis), the Reentry Policy Council guarantees the safe and successful return of individuals from prison or jail to the community.<sup>607</sup>

Taken at face value, such a guarantee might well seem preposterous. No one seriously ensures the elimination of recidivism. Treated as puffery,

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local circumstance; see REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 16–22.

605. The feedback loops are often featured in the course of describe “evaluation,” to use the Report's rhetoric; see *Id.* at 88.

606. For a prominent example of the more radically egalitarian democratic experimentalism advanced in recent years, see Michael C. Dorf & Charles F. Sabel, *supra* note 579.

607. REPORT OF THE REENTRY POLICY COUNCIL, *supra* note 3, at 2.

the warranty seems needlessly overstated, at odds with the prudence the Report often reveals, perhaps especially in identifying likely obstacles to implementation. But what if we see this guarantee through a utopian lens that has searched for, discovered, and now aims to impose a totalizing system? Understood in this way, the guarantee might well be utterly solemn. The Report *does* mean to say this system, the Reentry Policy Council's system, CSG's system, will work: If everyone else does as they are instructed, we guarantee successful reentry. We can move toward an unassailable future in accordance to scientifically produced and measured commands. This is utopia as coherent technocratic totality, managing to substitute each individual human part to its scientific system of logic.<sup>608</sup>

Understood in this utopian sense, the Report should evoke both comfort and alarm. To believe that bipartisan mainstream reformers have derived and shared directives that, if followed, guarantee successful reentry would appear to solve the problem of recidivism and its fiscal impact on state and local governments. To realize that many believe the CSG can develop a comprehensive system that could ensure successful reentry, once and for all, would appear to confirm some massive delusion has taken hold. It is entirely possible, even likely, that large numbers can feel both reassured and distressed by the Report. Such can be the impact of kindred utopian visions.<sup>609</sup>

At the same time, it is entirely possible that this utopian vision serves, for CSG, as both forthright statement of its bipartisan ideology and deep rationalization of the biases that shape the current criminal justice system. The Reentry Policy Council, and CSG more broadly, indeed can believe what otherwise sounds incredible, yet not all expect to succeed in ensuring successful reentry (at least not in the foreseeable future), and still provide bi-partisan elected and appointed officials' evidence that they are attacking out-of-control costs while securing (and perhaps enhancing) safety. With at most status quo-plus changes ensuing, with biases strengthened and not compromised, targeted massive incarceration and social control can continue to thrive.

Utopia as hyper-rationalized technocratic totality may explain why the Report altogether evades a question that pervades every policy statement and recommendation: How can we credibly believe that the same exact

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608. The literatures on such utopian visions are huge, across categories and ideologies, but one place to begin is with certain classics such as KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1945) and HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1948). For a provocatively insightful account and critique of sexual abuse understood in this totalitarian sense, see Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309 (1992).

609. For one too often neglected exploration of the simultaneously soothing and disturbing aspects of democratic life, variously construed and imposed, see e.g., CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1985).

people in charge of implementing targeted mass incarceration and social control are suddenly suited at all (much less best suited) to be in charge of a fundamental reorientation toward reentry? Even reentry carved out and isolated as a cost-savings and safety-ensuring dimension of the reigning criminal justice system? But through the Report's "once and for all" utopian lens, the human characteristics of personnel in time fade and even vanish. The comprehensive approach to reentry manages somehow to convert each human into functional operatives within the totalizing system. Meanwhile, interim failures only help to ensure the reproduction of the status quo. Even an ultimate success of the fundamental transformation aims only to create status quo-*plus* changes in targeted mass incarceration and social control.

#### **IV. Have We All Become Invested in Targeted Mass Incarceration and Social Control?**

I am among those who consider the prevailing approach to criminal justice—targeted mass incarceration and social control—wrong. By wrong, I mean it is both descriptively inaccurate and morally misleading. And I am among an apparently much smaller group of people who consider the vision of reentry articulated by the Reentry Policy Council likely doomed by its own inability or unwillingness to expose these biases. I would have thought this fundamental fact—the tension between the utopian aspects of the Report and the continuing biases that likely nullify those aspirations—would have been immediately grasped by most, questioned by many, and condemned by some. But that has not been true, and we must wonder why.

Perhaps those who do apprehend the design of the Report avoid speaking out about it, probably to remain in good standing with CSG, federal funders, and the bipartisan mainstream reformers of the Reentry Policy Council. Their interests overlap, plain and simple. But that may not be all that's happening. Perhaps fewer "see" these status quo tilt of the Report than I first imagined. Targeted mass incarceration and social control may have so normalized deep denial about exactly how we practice criminal justice that a wide range of people (and their offices, organizations, institutions, and systems) no longer can spot the background rules that define the ideological tilt.

Certainly, it's true that even some who have criticized mass incarceration now no longer see how they too have become invested in the status quo. They heartily endorse the Reentry Policy Council's vision of reentry while warning only that it is an uneasy coalition and difficult enterprise. In so doing, they may regard themselves as practical. They keep themselves in good standing with the only federalized game in town, one that happens to possess dollars to offer and prestige to lend. Or they may see

themselves as keeping a hard-to-secure seat at the table with bipartisan establishment players, (in the Beltway sense of “we’re getting something done and the rest of you are just spitting in the wind”). Or these folks may label themselves “pragmatic” in the very same very thin scientific sense evident in the Report’s unalloyed insistence on “evidence-based” programs and treatment.

In any event, the strong endorsement of the Report by those who may still regard themselves as critics inescapably strengthens the biases favoring targeted mass incarceration and social control. If those who once appeared to resist the fanatical “tough-on-crime” ideology intentionally aim to reinforce its biases, they can hardly be regarded any longer as serious opponents of the status quo. Perhaps they never were. But if their support of these deep status-quo reinforcing predispositions is only inadvertent, then all the more reason to regard the ideological biases as successfully legitimated, as deeply rationalized and denied even by some militant opponents of the reigning criminal justice system. They’re in way deeper than they think and we would like to believe.

But matters may be more entangled still. I have tried so far to unpack what might be regarded as “the interests of the bipartisan mainstream reformers.” Again, I do not believe those “interests” are a monolithic whole, somehow seamlessly woven together, without divergent origins and trajectories. I have aimed to sketch in various ways the possible investment of those working of the Reentry Council itself (including any utopians among the staff and collaborators). And I’ve aimed to emphasize the possible (likely) interests of all those who want to remain in good standing with CSG and its wide circles of influence and dollars. Even my description of the militant opposition is designed, in part, to emphasize that despite the evident ideological power of targeted mass incarceration and social control, we’re not living within some thoroughly triumphant totalitarian regime. You can diverge in your thinking, and you can act on what you think.

But in sketching as needed the overlapping interests of the bipartisan mainstream reformer, and in describing the aims and methods of militant opponents, I do not at all mean to suppress or sidestep a crucial question: After so many decades, have we all now somehow become invested in targeted mass incarceration and social control? What might even limited particularities about some other clusters reveal about how we might have internalized and relate to current “tough-on-crime” criminal justice? As we all have known it for several decades and as the younger generation among us have been born into it?

To begin with one example among dozens that we might readily name and examine, let’s consider Michael Bloomberg, perhaps the most prominent registered Independent in the United States. In proudly

defending and upping his wager on “stop and frisk” in mainly Black and Latino New York City neighborhoods, Mayor Bloomberg regards himself as the only (certainly one of the only) truth-speaking public servants. Crime must be stopped and he knows how to do just that. Forget that the evidence reveals an unwarranted invasion of Black and Latino communities, producing “positive outcomes” that might achieved through any number of radically less racist and disruptive means.

Sticking to his story, digging deeper into his well-defended biases about Blacks and Latinos and their neighborhoods, Bloomberg just “knows” that some commit crimes and others do not. And he can and should encourage the NYPD to profile those who commit crimes and their neighborhoods, making the people of those communities and all of New York City safer. And by “uncovering” some illegalities, he can demonstrate that suspending allegiance to the constitution, and “letting cops be cops,” can work crime-fighting wonders. The categories are tight, the story straightforward, and dissent can be dismissed as clueless or dissembling.

Bloomberg’s immediate political and legal collaborators, those within and around City Hall circles, feel much the same way about themselves. Unafraid of attacks from the “politically correct,” they proclaim the NYPD simply targets “behavior” and not race. They have developed “stop and frisk” programs for neighborhoods many can name without knowing much at all about New York City. Or maybe only racially defined demographic concentrations within each borough. They have worked very hard to legitimate as utterly rational and even scientific all that they undertake. In their minds, they and the Mayor have combined sophisticated empirical methods and street smarts to enhance their capacity to make New York City far safer than ever before.

But there is more still that Bloomberg’s supporters and Bloomberg himself gain from targeted mass incarceration and social control. They get to classify themselves as “law abiding,” and their neighborhoods and communities as meriting inattention from the NYPD’s “stop and frisk” patrols. If some commit crimes and other do not, and if we know who’s who, then the criminal justice system should declare in advance some targets of and others immune from scrutiny. NYPD does not aim its patrols at all neighborhoods and all groups equally. Not even close. And the reasons for profiling are compelling, Bloomberg and his folks would respond. Some engage in illegal acts and others do not.<sup>610</sup>

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610. Of course law abiding and law-breaking informs and reflects parallel divisions, not least the deserving and undeserving distinction, about which there is a significant decades-old interdisciplinary literature, recently examined in the illuminating work of Noah Zatz. See e.g., Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550 (2012).



But what if we examine almost at random one of dozens of examples that immediately come to mind? What if in the effort to enforce drug laws, Mayor Bloomberg concentrated NYPD personnel on all private schools and all the kids going to private schools and all those they ever associate with and all those neighborhoods where they travel and live. And what if cops zoomed in with the same vigilance they bring to Black and Latino communities? What we know about who uses and distributes drugs, and perhaps insider knowledge about drug use among those who attend New York City's private schools, would strongly predict the NYPD would uncover serious drug violations at least as often as the "stop and frisk" programs uncover serious crimes in Black and Latino neighborhoods.

Or consider just one more example. What if in the effort to enforce drug and gun laws and, well, all sorts of other laws (theft, spousal abuse, assault and battery), Mayor Bloomberg used his billions to hire military personnel to target New York City's finest—all the thousands who work for the police department. And what if military personnel ardently profiled law enforcements' friends and associates, their families and kinship networks, the neighborhoods they travel to and the communities in which they live? Were the practices that NYPD pursues in current "stop & frisk" communities applied with equal conscientiousness to cops on the beat and their networks and neighborhoods, do we actually believe we would uncover fewer serious crimes than law enforcement currently finds in the Black and Latino communities of New York City?

But none of this appears ever to occur to Mayor Bloomberg. Or if it does, he deflects or denies, avoiding the risk of cracking open his tidy airtight categories (law abiding and lawbreaking, most obviously). Indeed, the Mayor's faith in his convictions seems so absolute I am amazed the New York Times isn't even more weirded out. And the fact that such convictions legitimize, as almost "natural," targeted mass incarceration and social control, suggest other deeply unnerving possibilities. So strong is the Mayor's secular faith that it's impossible not to consider the deeply disconcerting likelihood that ugly self-justifying rationality and damaging biases may have spread further than we routinely acknowledge. Have an even wider range of us become blind to biases of the criminal justice system that has reigned for nearly four decades?

Certainly, at least some members of New York City's plutocratic class continue to believe targeted mass incarceration and social control made New York City safe and clean and attractive (Well, that and their own contribution on Wall Street, of course). But if you believe these Wall Street elite are just others in the Mayor's circles of friends, you should realize these plutocrats are not alone in believing targeted mass incarceration and

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social control—yes, those “stop and frisk tactics” and Rockefeller Drug Laws and more—are what made New York City magnetic to transplants and tourists from around the globe. Others classes far distant from plutocrats (though perhaps dreaming of the day) join in voicing their belief in the wild successes of “tough on crime” practices and policies. They market panic messages about, say, Bill de Blasio’s “liberal politics” undermining all that has made New York City safe and successful.<sup>611</sup> And from the perspective of New York City’s plutocratic class and so many who yearn to be them, what’s good for New York is good for the nation.

Even if “wannabe plutocrats” are indeed different from a billionaire mayor and his Wall Street dinner companions, their united voices may not be terribly revealing of a distinctively wider set of people invested in targeted mass incarceration and social control. Let’s get further away, by some distance. Might those invested include even those whose communities are profiled and devastated by these policies and practices? Blacks, Latinos, Natives, and poor women and men and children of every race, for example?

Consider young women and men of color, especially Black and Latino/as, who make their way to college. Even if they grew up far away from any tough low-income neighborhood, even if they were the straightest arrow in East L.A. or Bed Stuy, they might still get profiled by the criminal justice system. (“Driving While Black,” “Driving While Brown”). But they may be said to benefit too. As needed or desired, they can claim they’re not like “them,” portraying themselves as law abiding, as might Mayor Bloomberg, though to different effect.

But that may not be the distinctive investment. Especially around their white college classmates, and even within their groups of color, they have learned to perform “gangster.” Precisely in order to project being “bad,” they need a criminal justice system that both presupposes all young men and women of color are or at least readily can be lawbreaking, a system that gets deep inside the heads of everyone around them, of all colors. They stage their bad-ass identity by projecting street cred that only a terribly biased system would make at all plausible. If you’re thinking “no way,” then you don’t know young college people of color or even what they post.<sup>612</sup>

Let’s get further away, in a related but special case. Might those invested in targeted mass incarceration and social control include even those who fight vigilantly against injustices of every sort. Even those who, in particular, challenge discrimination in all its varied ugliness? Even those

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611. See e.g., *Wooing ‘Hometown Industry,’ de Blasio Meets Wary Wall Streets*, N.Y. TIMES, Oct. 12, 2013, [http://www.nytimes.com/2013/10/12/nyregion/wooing-hometown-industry-de-blasio-meets-wary-wall-st.html?hp&\\_r=0&pagewanted=all](http://www.nytimes.com/2013/10/12/nyregion/wooing-hometown-industry-de-blasio-meets-wary-wall-st.html?hp&_r=0&pagewanted=all).

612. See e.g., *Acting Like Cholos/as*, *Stuff Educated Chicanos Like: Information on Those Kids from Aztlan*, (Nov. 20, 2011), <http://stuffededucatedchicanoslike.wordpress.com/2009/11/20/11-acting-like-cholosas/>.

people of color who valiantly fight against race discrimination wherever they find it? How about Paul Butler and Michelle Alexander, two remarkably gifted and skilled lawyers, both deeply identified with the Black community, both able to “see” much that the rest of us may fail to identify, and both demonstrably capable of making converting their striking insights part of the national conversation about justice?

In the overlapping stories of personal and professional and ideological transformation, both Butler and Alexander describe how much and for how long they accepted as true the fundamental justice of the “tough-on-crime” regime. In some mix of conscious and unconscious legitimization, they wanted to believe cops, prosecutors, judges, correctional officials and everyone else aimed and mainly succeeded in formulating and enforcing criminal laws even-handedly. In so doing, they might well have been speaking for or alongside so many others in the tri-partisan mainstream.

Far more than most, however, both Butler and Alexander appreciated that this fundamentally just criminal justice system produced disturbing exceptions. Far more than most, they could spot these deviations, especially racially-charged dynamics and consequences. And, far more than most (including those who proudly classify themselves as progressives or on the left or radical), they would battle racist policies and practices, modern variations of centuries-old bigoted behavior targeting people of color. Butler and Alexander may have regarded racism as a pathology in an otherwise healthy criminal justice system, but they threw down with all their might in the struggle to fight the disease.

Alexander and Butler can be described, accurately, as not about to compromise their Blackness, even and especially as they rose through professional ranks. But even for them, the very idea that the criminal justice system might be built upon and propelled by race-, class-, gender-, and geography-biased ideological convictions proved for the longest time, well, too off-the-wall to take seriously. In time, even perhaps through epiphanies, they found such depictions increasingly credible and, then, the truth they must embrace and speak. (Alexander tells stories about her “awakening to the new Jim Crow”<sup>613</sup> and Butler describes himself as a “recovering prosecutor.”<sup>614</sup> Such transformations are themselves important and intriguing. But for now, all I mean to emphasize is just how much even these two remarkable souls had been utterly invested in defending the basic fairness of the “tough-on-crime” criminal justice system.

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613. Michelle Alexander, *Awakening to The New Jim Crow System*, UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS (July 6, 2013) <http://www.uua.org/multiculturalism/271760.shtml>.

614. For only one illustration of Butler’s label for himself, *See e.g.* Paul Butler, *Jury Nullification: Power to the People*, PRISON LEGAL NEWS, available at <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=21341&AspxAutoDetectCookieSupport=1>.

I can offer still more examples of people, of clusters who might (for ideological, material, aesthetic, erotic, identity, and other reasons), be more tangled up with targeted mass incarceration and social control than they may realize or we may commonly acknowledge. But Alexander and Butler demonstrate, at least for me, how much even the most rebellious among us may be entwined with precisely what we would aim to transform. And they permit us to grasp a bit more lucidly certain bewildering aspects of how we react both to the current criminal justice system and to bi-partisan mainstream reform, including the Report.

### Closing

Measured by its own stated goals for reentry, much less as cunning utopian instrument designed to change the reigning criminal justice system, the Report seems demonstrably a failure.<sup>615</sup> People need to lose their jobs and the CSG its funding. Yet assessed as a legitimizer of the status quo, fortifying existing biases and producing at most status quo + changes, perhaps the Report should be regarded as a smashing success. If the Reentry Policy Council and CSG are to be measured only by how well they reinforce and reproduce precisely what through the Report they claim they shall transform, then we should perhaps pause to consider whether their current government, foundation, and private funders will reward them (yes, including the utopians in their midst) with only a small raise or a sizeable one.

That merit raise does not at all reflect anything original about the Report. In the fashion characteristic of mainstream reformers, the Reentry Policy Council and all with whom they collaborate claim to transform what they only further fortify through familiar means. They serve their own (varied yet overlapping) interests. They offer prescriptions that, even on their own terms, often seem questionable and even sometimes laughable. And, far less often noticed, they engage in analysis that by virtue of the categories, stories, and arguments deployed in the reasoning process offer ambitious (even utopian) recommendations built upon the very predispositions that gave rise to and reproduce the status quo ostensibly targeted.

Even the considerable preoccupation with cost-saving and safety-enhancing reentry triggered by the publication and marketing of the Report, and by the grants awarded to all those who vow allegiance to its dictates, is

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615. Even close allies and former funders of CSG have recently begun to challenge basic aims, claims of success, and likely trajectory. See e.g., James Austin et al. Ending Mass Incarceration: Charting a New Justice Reinvestment, THE SENTENCING PROJECT (2012) available at [http://sentencingproject.org/doc/publications/sen\\_Charting %20a%20New%20Justice%20Reinvestment.pdf](http://sentencingproject.org/doc/publications/sen_Charting%20a%20New%20Justice%20Reinvestment.pdf).

part of a recognizable pattern. Mainstream reformers across realms (immigration, legal education) routinely get others to focus on some dimension of what they perhaps want or at least are willing to change. Meanwhile, the transformative proposals categorically exclude or bury or at least obscure from scrutiny precisely the predispositions that reinforce the very system in crisis. To produce status quo + changes turns out to represent perhaps the way mainstream reformers catapult “what is” (almost entirely unaltered) into the future.

But familiarity may well be a virtue not a vice. Were CSG too original, too notable in its formulation of the problem or the solution, more constituencies might well have paid far closer attention than appears to have been true. That attention might well have stirred controversy, certainly among militant opponents, perhaps from the fiscally conservative right, perhaps even among those who ally themselves with state elected and appointed officials. Instead the Report’s recognizable design appeared to have dampened and perhaps even preempted growing concerns over the cost of mass incarceration.

Its considerable length, its apparent scientific sophistication, and its seeming attention to detail proved confidence-inspiring. Even perhaps the Report’s strong totalizing utopian vision (experts providing a plan that, if enforced, guarantees success) generated more reassurance than alarm. That will likely continue to be true so long as few actually study the Reentry Policy Council’s message, which history suggests seems likely. Perhaps what it means to believe in the United States is to accept that when bipartisan mainstream reformers like CSG finally get down to business they really mean what they say and do what they mean.

I have no illusions about just how significant a contribution results from any sustained effort to unmask this or any other status-quo reinforcing document—be it a constitution, a piece of legislation, a judicial opinion, or a prominent policy proposal. The work should be done and plays a role. Just as other work must be done and plays a role in challenging the reigning criminal justice system. We should industriously lobby for still more “ban the box” laws;<sup>616</sup> we should painstakingly research and produce routinely updated local Reentry Guides;<sup>617</sup> we should design ever more accurate and

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616. For recent news coverage of the successful spread of “ban the box” laws, see *e.g.*, Brent Staples, *Target Bans the Box*, N.Y. TIMES, Oct. 29, 2013, [http://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box/?hp&rrref=opinion&\\_r=1](http://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box/?hp&rrref=opinion&_r=1). And for a description of All of Us or None, the grassroots civil rights organization that has led this “ban the box” and other campaigns, see Legal Services for Prisoners with Children, All of Us or None, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/> (last visited Oct. 30, 2013).

617. With the remarkable contributions of community residents, law students in various of my clinics, Rusty Klibaner, Robin Lee, Frank López, and Shauna Marshall and with a grant to cover publishing costs from the Rosenberg Foundation, I wrote and published a guide for those facing reentry in Los Angeles. Gerald P. López, The Center for Community Problem Solving

revealing survey instruments that aim, at some point, to permit all those most directly affected by targeted mass incarceration and social control to evaluate services provided;<sup>618</sup> we should create and recreate ever better workshops for prisons and jails and neighborhoods, all to better equip diverse people to understand particular challenges and ways of effectively dealing with them.<sup>619</sup> And so much more.

Meanwhile, we should not trust, in any way, those who claim we need only modest changes in an otherwise just criminal justice system. Make absolutely no mistake. The Report is written by presumptively law-abiding people for other presumptively law-abiding people to provide a comprehensive system for how to treat convicted law-breakers and those living in neighborhoods and communities presumptively (categorically) more inclined to commit crimes. The biases that drive the Report, all of the Reentry Policy Council's work, all of CSG's work, utterly reinforce precisely the brutally punitive and phenomenally expensive system of targeted mass incarceration and social control.

We all carry the shame of the continuation of the current status quo—yes, including even the most militant among us. We must do all within our powers to nullify its effect, informally, and formally, each and every day and over time, through every big collective action and through every individual exercise of informal discretion. Nothing less stands a chance against so deeply rationalized and well immunized a regime. We must abolish targeted mass incarceration and social control and in its place begin to configure a criminal justice system deserving of a radically democratic and egalitarian world. And we shall do so only if we are able and willing to change ourselves.

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Reentry Guide – Los Angeles: The Center for Community Problem Solving Press (First Edition 2011).

618. For a brief description of years of work developing such consumer surveys, evaluations, and tester schemes during the life of the Center for Community Problem Solving, see *e.g.*, The Center for Community Problem Solving, <http://communityproblemsolving.org/projects/consumer/index.html> (last visited Oct. 30, 2013).

619. For only one example among many across the country of grassroots organizations providing such workshops and services, see A New Way of Life Reentry Project <http://anewwayoflife.org/> (last visited Oct. 30, 2013).

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